United States Court of Appeals for the Second Circuit



APPELLEE'S APPENDIX

UNITED STATES COURT OF APPEAUS

for the

SECOND CIRCUIT



BETTY LEVIN, ALLEGHANY CORPORATION and ROBERT LeVASSEUR,

Plaintiffs-Appellees,

-against-

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT, T.C. DAVIS and THOMAS F. MILBANK,

Defendants-Appellees,

MICHAEL MOUMOUSIS and NAPOLEON C. GABRIEL, JACOB R. COHEN and JUNE COHEN,

Objectants-Appellants

Appeals from Three Decisions of the District Court

JOINT APPENDIX OF APPELLEES Volume I

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Railroad Company, et al.

PAGINATION AS IN ORIGINAL COPY

INDEX TO THE JOINT APPENDIX OF APPELLEES

Item		Pages
-	Docket Sheets	-
	Moumousis Appeal Documents	
1.	Notice of Motion to Set Aside Judgment and	
	Order of May 2, 1973	1-2
2.	Petition of Michael Moumousis	3-22
3.	Affidavit of M. Lauck Walton in Opposition	
	to the Petition of Michael Moumousis	23-63
4.	Memorandum Opinion of the Honorable Edward	
	Weinfeld dated December 7, 1973 denying	
1	motion of Michael Moumousis	64-65
5.	Notice of Appeal of Michael Moumousis dated	
	January 1, 1974 of the denial of his motion	
	to set aside the Judgement and Order of May	
	2, 1973	66-67
	Gabriel Appeal Documents	
6.	Notice of Motion of Napoleon C. Gabriel to	
	modify the Judgment and Order of May 2,	
	1973	68-69
7.	Petition of Napoleon C. Gabriel	70-71
8.	Supplemental Petition of Napoleon C. Gabriel.	72-74

Item		Pages
9.	Transcript of Hearing, before the Honorable	
	Edward Weinfeld, on March 26, 1974 of the	
	motion of Napoleon C. Gabriel	75-85
10.	Memorandum Opinion of the Honorable Edward	
	Weinfeld, dated April 8, 1974 denying the	
	motion of Napoleon C. Gabriel	86
11.	Notice of Appeal of Napoleon C. Gabriel post-	
	marked June 17, 1974 of the denial of his	
	motion	87-89
	Fee Application Documents	
12.	Notice of Application of Alleghany Corporation	
	for Counsel Fees and Expenses, with Affidavits	
	of John E. Tobin and Jared C. Horton, without	
	exhibits	90-108
13.	Notice of Motion for an order directing de-	
	fendants Missouri Pacific Railroad Company and	
	Mississippi River Corporation to pay Orans	
	Elsen and Polstein and Pomerantz Levy Haudek &	
	Block \$2,000,000 as legal fees and \$22,422.06	
	for disbursements, and Application of Couns 1	
	for Plaintiffs Levin and LeVasseur for the Allo	- w
	ance of Counsel Fees and Expenses	109-145

Item		Pages
14.	Transcript of Hearing before Judge Weinfeld,	
	on March 26, 1974, of the applications of	
	Orans Elsen & Polstein and Pomerantz Levy	
	Haudek & Block, and the application of	
	Alleghany Corporation, for counsel fees	
	and expenses	146-164
15.	Opinion and Order of Judge Weinfeld setting	
	counsel fees and expenses	165-173
	Documents of General Relevance	
16.	Notice of Settlement of Order, and Order	
	of Judge van Pelt Bryan, dated October 9,	
	1968, determining the instant action to be	
	a class action	174-178
17.	Amended Supplemental Complaint of Alleghany	
	Corporation	179-201
18.	Stipulation of Settlement and Settlement	
	Agreement, including the Plan of Recapitalizat	ion 202-241
19.	Objections of Jacob R. Cohen and June Cohen	
	to the Approval of the Proposed Settlement	242-144
20.	Transcript of Hearing, before Judge Weinfeld,	
	on January 25, 1973, of the approval of	
	settlement	245 266

Item		Pages
21.	Opinion of Judge Weinfeld, dated March 19,	
	1973, approving the settlement	367-388
22.	Order and Final Judgment of Judge Weinfeld	
	approving settlement, filed May 2, 1973	389-391
23.	Petition of William R. Wesson for an Order	
	to Show Cause	392-400
24.	Order of the Court of Appeals for the Second	
	Circuit filed June 12, 1973, affirming the	
	Opinion of Judge Weinfeld approving the	
	settlement	401
25.	Letter from the Clerk of the Supreme Court	
	advising of the denial of the petition	
	for certiorari of William R. Wesson	402
26.	William R. Wesson's Petition to the Supreme	
•	Court for Rehearing on Petition for Writ	
	of Certiorari	403-418
27.	Letter from the Clerk of the Supreme Court	
	advising of the denial of the petition	
	for rehearing	419
28.	Report and Order of the Interstate Com-	
	merce Commission, dated December 6, 1973,	
	approving the issuance by the Missouri	

Item		Pages
	Pacific Railroad Company of securities	
	pursuant to the Settlement Agreement and	
	the Plan of Recapitalization	420-501
29.	Petition of William R. Wesson for Recon-	
•	sideration of the Report and Order of	
	the Interstate Commerce Commission	
	dated December 6, 1973	502-512
30.	Order of the Interstate Commerce Com-	
	mission, dated January 23, 1974, deny-	
	ing the petitions for reconsideration	513-514
31.	Proxy Statement of the Missouri Pacific	
	Railroad Company, dated May 8, 1973	515-563
32.	Order of the Court of Appeals, Second	
	Circuit, dated August 27, 1974, grant-	
	ing appellants Moumousis' and Gabriel's	
1.	motion to extend time to docket appeals	564
33.	Affidavit of Gerard M. Carey In Opposi-	
	tion to Motion for Summary Dismissal	
	of the appeals of Napoleon Gabriel,	
	and Jacob and June Cohen, without	
	attachments	565-568

CIVIL DOCKET 67 CIV 5095 UNITED STATES DISTRICT COURT

Jury demand date:

C. Form No. 106 Rev. (CLASS ACTION) ATTORNAVE For plaintiff: BETTY LEVIN, on behalf of herself and all other Orans, Elsen & Polstein(Attys for Batty L holders of the Class B Common Brook of Missouri Pacific Railroad Company, and on behalf of said 10-East-4044-Shreet;-NX-10016 1 Rudiofell LE 2-4224 LT HX 10050 -corporation& Robert LeVasseur-Intervenor-9-30-68 788 Alleghany Corporation - intervenor plaintiff. Changed to 30 kockefuller Plaza NY 10020 489-4100 MISSISSIPPI RIVER CORPORATION, Understate Levy Haudek & Block (for Hobert Levassour) 295 Madison Ava.
NYC,NY 10017 MISSOURI PACIFIC RATLROAD COTTANY. ROBERT H. CRAFT, T.C. DAVIS and THOMAS F. HILBA'IK Labocuf, Lamb, Leiby & MacRae (Attys for frank) One Chade Manhattan Plaza Hational Bankl HC,NY 1000! 1-24-73 (212) 11A "-6262 (Juccessor voting taustos) For defendant: Low Laighton Mice litror Long 6 E 15th St NY: MI 2-2361 SULLIVAN . CHOIWELL 18 Wall St MYC Dewey, Ballantine Bushby, Palmer & Wood 2.3. The Broadway, NYC. 10005 (Mississippi Rives MAC'NA Jullivan & Cromcoll (Attys for Missburt Pacific Railroad Co T.C.Davis and Thomas F. Milbank RECEIPT NO DRANS Clerk S. 5 mailed PARKLY USTIEMS Marshal S. 6 mailed ALEM USTICK Docket fee Basis of Action: Ordered to Concy clam and pay dividends on ass B Stock determined by Witness fees mrt Depositions ction arose at:

,	DATE	PROCEEDINGS	Date Orde
	Mac . 29-62	Filed Complaint and issued summons (except T.C.Davis) to answer complaint to	
	1.1.21,-68	2/23/68. Metzner. J.	
	Jan 25-68	2/23/68. Metzner, J. Filed defts' notice to take deposition of pltffsup. issued	
	Jan. 29-68	Filed Notice to take Deposition.	
	Jan 29-68	Filed summons " return, service as follows: Mississippi River Corp. by Mr. Craft 1-11-08	
		Missouri Pacific Ru Co. by T.H. O'leary 1-4-68	
		Robert H. Craft personally 1-11-68	
	:	mi aman E Milhark paremally 1-2-68	
	Feb 1-68	Filed defts' (Mississippi River Corp., et ano.) affdyts. & show cause order to tra-	3= -
	k	fer, etcret. 2-13-68 Filed mefts' (Mississippi, et ano.) memorandum in support of their motion	
	Feb 1-68	Filed stip. corder adjourning deposition of pltff. sine die. Coper, J.	
	Feb 7-68 Feb 9-68	Filed stip, adjourning motion filed 2-1-68 to 2-27-68 (M)	
•	Feb. 26-68	Filed affidavit of William E. Haudek.	
		Filed Affidavit of Sheldon H. Elsen.	-
	Teb. 26-68	this to the standing dufts Hohart H.Craft and Thomas F.Milbank's time to	
	Apr.3-68	answer complaint to a date 10 days following determination of a motion now	
	-	nending. So ordered. Tyler, J.	
•	Apr. 12-68	- 1/02/// 1 - 1/02///	
	1	support thereof.	
	pr.12-66	Filed Memorandum in support of motion of Alleghany Corp. for leave to intervence.	-
	Apr. 22-68	Filed stipulation adjourning motion new ret. 1/23/68 to 1/30/68. Filed defts' (Mississippi River Corp., et ano.) affdyt. in response to mother of	
	pr. 26-68	All and the Comp for leave to intervene	
)	pc 26-68	Filed defts (Mississippi River Corp., et ano.) memorardum in response to motion	4
	£	Alleghany Corp. for leave to intervene	1
	5 -30-68	Filed (in court) Affidavit of Granville Whittlesey, Jr. (Reply Affidavit) Filed (in court) Reply Memorandum in support of mutic. by Alleghany Corp. to inter	- cas
	11.30-68	but a server with an anti-on the but by 12/100 - The objecting distinction	
	2.7 2-68	The standard of the property o	·
)	!	be deferred for reasons which the Court finds unpersuasive. The motionis-	
		granted. So ordered. Meichey. J.	
	7-68	Filed complaint of Intervenor Plaintif: Alleghany Corporation.	
	Ly 15-68	Filed additional summons a return, served T.C. Davis personally 5-9-68	-
	5-61	I willed etto & order extending time of deft. T. C. Davis to answer ind complaint	-
	T 22 7.53	les a date ton (10) days following the entry of an order decomplication and received	3
1	L	defts. Mississippi River Corp. et ano under 28 U.S.C. LLOL and Rules 12(b), 19(t	
	<u> </u>	23 and 23.1, F.k.ofC.P. and that the time within all defts. are required to augustion the complaint of plaintiff-intervenor is extended to a date ten (10) days following the complaint of plaintiff-intervenor is extended to a date ten (10) days following the complaint of plaintiff-intervenor is extended to a date ten (10) days following the complaint of plaintiff-intervenor is extended to a date ten (10) days following the complaint of plaintiff-intervenor is extended to a date ten (10) days following the complaint of plaintiff-intervenor is extended to a date ten (10) days following the complaint of plaintiff-intervenor is extended to a date ten (10) days following the complaint of plaintiff-intervenor is extended to a date ten (10) days following the complaint of plaintiff-intervenor is extended to a date ten (10) days following the complaint of plaintiff-intervenor is extended to a date ten (10) days following the complaint of plaintiff-intervenor is extended to a date ten (10) days following the complaint of plaintiff-intervenor is extended to a date ten (10) days following the complaint of plaintiff-intervenor is extended to a date ten (10) days following the complaint of plaintiff-intervenor is extended to a date ten (10) days following the complaintiff th	
	1	ing the entry of an order determining the motion by defts. Mississippi River Com	P
	1	let and under the same rulesMotlev. d.	+
	an. 28-6	Filed transcript of record of proceedings of 3-19-68 before Herlands, J.	+
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	Fire 15-6	8 Filed reply memor: quar. 10 Copport of material to transfer,	-
	15-7	8 Filed plaintiff to memornion of law in remains to real; trief. (filed in court.)	-
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PROCEEDINGS

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cause, is hereby made a party plaintiff, and may file a complaint in this cause in the same manner and with like effect as if named an original party plaintiff to this cause. The title of this action is hereby amended to read as indicated.—Bryan, J. mm Filed complaint in intervention of Robert LeVanseur. (no summons issued.) Filed notice of settlement and order—Ordered that this action is determined to be a class action within the provisions of Kule 23(a). (b)1 and (2). FECT and as further indicated.—Bryan, J. mn (Consented to) 1.28-66 Filed defendant's notice of rejection and return. 1.37-68 Filed ANSWER of defts. Missouri Pacific R. R. Co. et al to complaint of Robert LeVanseur. 1.68 Filed affidavit of Michael M. Manay of service by mail. 1.69 Filed affidavit of Gilbert P. Strelinger. 1.60 Filed affidavit of Gilbert P. Strelinger. 1.60 Filed affidavit of Gilbert P. Strelinger. 1.61 Filed affidavit of Gilbert P. Strelinger. 1.62 Filed affidavit of Gilbert P. Strelinger. 1.63 Filed affidavit of Gilbert P. Strelinger. 1.64 Filed affidavit of Gilbert P. Strelinger. 1.65 Filed ANSWER of deft. Mississippi River Corp. to answer the complaint to 11-12-68 and time of plaintiff LeVanseur to make any motion under 1.66 Filed ANSWER of deft. Mississippi River Corporation to complaint of Robert 1.67 Filed ANSWER of deft. Mississippi River Corporation to complaint of Robert 1.68 Filed Interrogs. propounded by pltffs. to deft. Missouri Pacific Rillinger. 1.69 Filed Rotice of Intention to intervene 1.11-68 Filed stip and Order time of deft. Missouri Pacific Rillinger. 1.11-68 Filed stip and Order time of deft. Missouri Pacific Rillinger. 1.11-68 Filed stip and Order time of deft. Missouri Pacific Rillinger. 1.11-69 Filed Rotice of Intention to intervene 1.11-69 Filed Rotice of Intention to intervene	20.60		
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		to object to interrors of pltffs, be dxt. from 12-5-68 to 1-6-69	-
Continue & Paris		Time of deft. to answer interroga. is ext. to 2-6-09 - so ordered	_
CORLINAL W. TO 1. 15		Control of Control	
		CONCERNICE & VOICE	

PROCEEDINGS

Filed affidavit & Notice of Motion of Rosalie J. Leventrittet to intervenc as pltff. =--ret. 1-7-69. .19-68 Filed Memorandum of Rosalio J. Leventritt, et al in support of application for intervention. .19-68 Filed pltff's interrogs. to doft. Mississippi River Corp. : 27-63 Filed stip and Order - time of doft. Miss.River Corp. to file objections to interrogs. be ext. to 1-14-69 = so ordered = 1.

3-69 Pilod stip and order time of doft. Minsour Pacific to object to 1.

interrogs. is ext. from 1-6-69 to 2-3-69 and time of dort. 1. anguer interrogs. is ext. from 2-6-69 to 2=21-69 = 80 ordered Palidori, J. (.-69 Filed Stip. (pltffs. Botty Levin) the notice of motion ret. 1-7-69 b adj. to 1-14-69 10-69 Filed Memorandum of Doft. Mississippi River Corp. and Missouri Pacific Railroad Co. in opposition to motion for leave to in.... ret. 1-14-69 .10-69 Filed Mc. orandum of Pltffs in Opposition to motion for leave to Intorvone 10-69 Filed Affdyt. on bohalf of pltffs.in opposition to motion for lead to interveno pet. 1-14-69
10-69 Filed Stip and Order time of deft. Mississippi River Corp. to file objections to interrogs, ext. to Jan. 18 and time to answer interrogs. ext. to 1-23-69. so ordered - Horlands, J. to interrogs, be ext. to 2-8-69 = no ordered = Bryen, J. 1-6) Filed stip and Order time of deft. Miss.River Corp. to answer into 1050. be ext. to 21-21-69 so ordered Byv.a. J.

5-69 Filed stip and Order - time of derts. Mississippi River Corp. and Missouri Pacific RR Co. to object to the interrogs is ext. from 2-1-69 and 2-3-69 to 2-17-67, --Weinfeld, J.

11-69 Filed stip and Order time of dofts. Missouri Pacific R.R.Co. missouri Mississippi River Corp. to object to interrogs. ext. from 2-17 to 2-21-69 -- so ordered -- Edelstein, J. Filed Memorandum of deft. Miss. Pac. RR Co. in support of objection. to interrogs. (Notice of Motion) .. 26-6) Filed Memorandum of doft. Miss. RiverCorp. in support of objection: to interrogs. .20. 69 Filed deft. Notice of motion ret. 3-13-69 10 A.M. Room 506 to small in objections to interrogs. .. 10-69 Filed stip and Order time for deft. Missouri Pacific R.R.Co. to answer pltffs. interrogs. is ext. from 3-3-69 to 3-10-67.-so ordered -- Cannella, J.
11-69 Filed Defts. Mississippi River Corp. Answers to interrogs. ..11-69 Filed Defts. Missouri Pacific Answers to Interrogs. Pacific R.R.) ret. on 3-13-69 be nd). to 3-20-69 motions (Miss.River garp. and Missour 19-69 Filed defts. stipulation that the motions of Miss.Riv.Corp. and Missouri Pac. R.R.Co. for orders pursuant to Rules 30 b and 33 ho 13-69 Filed memo end. on motion filed Feb. 26,1969 =motion consented to Settle order on notice -- Tenney, J. 13-60 Filed memo end. on motion filed Feb. 26-1969 -- motion consented to:

FP1-LK-12 3-63-12M-2946

SEENELT PAGE

settle order on notice -- Tenney, J.

led transcript of record of proceedings July 15,1 of map and October - that offices by define in Lasippi Liver C rp. for or era under 1. ordering to cott in interse of by pitte, ret. 0.12-19. hereby consented to. Parsumit to dea. Rule 9 r. o. 11. this Court the objections of MoPac to said interregs. have resulves between counsel as indicated, etc. -- sarorder Tenney, J. mn iled stip and order time of deft. Missouri Pacific ER Co. Lo mayor plrffg. interrogs 18 ext. to 7-11-69 --14 69 Filed Auguers to pltffs, in errogs, of deft, Miss, River Corp. Filed Supplemental Answers to pltffs. interrogs. of deft. History Filed Additional memorandum on behalf of Rosalie J. Liventrict in support of application for intervention. 15 69 Filed Opinion #36012 -- Accordingly, applicant is hereby dented Promission to intervene pursuant to FRCP 24 b. The months. denied inall respects. so ordered -- Herlands, J. Filed concent to substitution of attorneys for deft. Mississippi River Corp C Filed derts' interrogatories to pltif Kilchany Corp. Filed OWER that plter shall file a not not leave & stated at of real 270 days or action to be discussed-Edelatein, Ch. J. m/n Filed stip and order that thus for pltff Alleghany Corp. to sarve its in or object to the interrogs., by dufts is extended from 12-11 /1 + ... 1-10-72 Ryan J. Filed Elip & order that time for pitff Alleghany Corp. to Bury and ra & ch. 111-72 to intervola, of dofts! is entureded from 1-10-72 to 1-24-72-50 ordered .. Filed stip & order that time place for pltff Alleghany Corp. to sec. a 11: or objections to inturrogs, of dofts' is a.t. from 1-24-72 to 1-31-72 0) Heinfild.d. The Piler Allerhany Corp. anguera & objections colored and the transfer of the Filed Pittr's sacended & supplemental anguers to interrogatorie. " Miled pitris (Alleghany Corp.) notice to take deposition of Witness William Uyer on 6-19-72. pltff's will take deposition. of the following persons as indicated. Filed pltffs' notice to take deposition of Myer, Dick & Co on 6-19-7?
Piled pltff's notice to take deposition of a witness William War on 6-17-7. Filed pltffs' notice to take deposition of witness IIS Equition on 6 19-2 Filed Duppl. interrogs propounded by pltffg doit Mississip i diver . 70 1: 12 Filed Stip & Order that pursuant to General Rules 9 (f) of the Rule of All Court certain of the objections of Alleghany Corp. to intervogs.p. dofts on 11-11-71 have been resolved but men counsel as 1 ... intent. Alleghany Corp. to serve ancuera to the foregoing interest in the So Ordered- Winfeld J. Filed Amended and Suplemental answers to interrogs cub iti i be pa Filed Notice of Motion rus Anguer Interrogs. Ret. in ROCH 1105 1 on 7/20/72 at 10 AM Filed Notice to take Deposition of Alleghany Corp. 15-14 Filed M morandum in support of diffa .motion to compal discovery etc. Filed stipulation and order ext oding defta, Hissouri Pacific H. His altic. and 12-1 72 Mississippi Rivar Corp.'s time teansur or object to Interregs. -Filed Wolts Afrid of service

DATE	PROCEEDINGS ASSIGNED TO WEINFELD J.	Data Order (
Jul 18-7	FILED PLTFE. (ALLEEGHANY CONFORATION) AMENDED & SUPPLEMENTAL ANSWERS TO INTEREST	
WELLEN TO	OGATORIES, SERVED ON IT BY DEFTS.	
July 19 7	2 Filed Stip & Order that the annexed pages are substituted for, and now replace	
į	the following pages of "Answers and Objections of Pitff Alleghany Corp. to Dofts' interrogs," served on 1-31-72 and filed on 2-1-72. So Ordered- Wainfo	
JUL 20 72	Filed Stip & Order that defts consent to the filing of the "Amended Supplement	11
1	Complaint of Intervenor Alleghany Corp." & that defts' time to answer shall ! ext. to Aug 9 1972. Weinfeld J.	
JUL 20 72	Filed Amended Supplemental Complaint of Intervenor Alleghany Corporation.	
rhugh-72	Filed Stip & Order that deft's motion dated Enth July 10-72 to compel bleghany corp. to answer certain fo defts interrogatories, dated 11-11-72	
Aug9=72	is hereby withdrawn. WEINFELD, J. Filed Amended Complaint.	
400 17 7	Filed Stip & Order that defts' time to answer etc re: Amended Suppl. complaint	
!	of Intervenor Alleghany Corp. shall be ext. to Aug. 16 1972. So Ordered: Weinfeld J	
Aug. 17-7	2 Filed stip. & order that the deposition of Alleghany by Kirby will hadk be held 9-11-72 and deposition of Clifford Ramsdell adjournments.	ned
	to an agreed date and deposition of John Burns on 9-26-72	
Jug. 17-7	2 Filed stip. & order extending defts' time to answer to amended	
Jug17-7	Filed ANSIJER of defts Missouri Pacific Railroad Co, Robert H. Craft	
	T.C.Davis and Thomas F. Milbank to Alleghany Corp's amended supplemental complaint.	
11318-72	inled ANSWER of deft Mississippi River Corp. to Alleghany Corp's Amended Supplemental Complaint.	
	Filed affdvt of service by mail, by Luis B. Pacquing. Filed pltff's interrogatories propounded to deft Missouri Pacific.	
hur 23-7	Piled pltff's interrogatories propounded to deft Missouri Pacific.	
015,24-7	2 Filed stip & order that deposition of the following has been adj. as indicated. So ordered. Weinfeld, J. 2 Filed interrogs to deft. Missouri Pacific RR.Co.	
11g. 28-7	2 Filed interrogs to deft. Missouri Pacific RR. Co. 2 Filed interrogs to deft. Missouri Pacific RR. Co.	
Sur 28-7	2 Filed interrogs to Mississippi River Corp. 2 Filed interrogs to Mississippi River Corp.	
Jug. 28-72		
Jug. 30-7	Filed FINER of defts. Missouri Pacific Railroad Co. Nobert H. Crait, T.C. David	
ing.30-7	and Thomas F. Milbank to Betty Levin's Amended Complaint. Filed Missouri Pacific Railroad Co.'s Answers to Pitfs'. Supplemental Interrogs	S&O
%ug.30-7	Filed Supplemental Answers of Fitt, Alleghany Corp. to defts . Interroga.	
Sep.1-72	Filed ANSWER of deft. Mississippi River Corp. to Betty Levin's Amanded Complaint.	
Sept.1-7	Filed pltf's (Allerham corp.) Request for documents as indic-ted from def	
ep t7-		tions
£ \$ \$ 17-72	Filed affide wit of Corol . Necessian, in opposition to pltfra motion.	
hit 7-72	iled defin memorandum in o, orition to motion. Filed pltffs. Memorandum in majort of protectiv order.	
	CVA 1PI LK 12 3-61 12M -2946	
,	((() ()	

DATE	PROCEEDINGS	Jud
Sapt 1-17	Filed Memo Emdorsed on Motion file d this date., Motion denied Weinfeld, J.	IA:
	Dia A Nation to Admit	0 .
Sep.8-72	The second of th	
Sep.15-72 Sep.15-72	Filed Supplemental Interrogs. propounded by pltfs. to Mississippi River Corp.	
op 21-72		!_
19,72	Filed pltff-intervenor's interrogatories to T. Davis. Filed Answers and Objections of Deft Missouri Facific R.R.Co to Pltf's Interrogs.	-
D.19.72	Till d A serong and Objections of Delt.Missouri active to the	-
27.72	the training of Witte to Dott Hissouri Facility Notes	+-
p.27.72	The state of Diffe to Deft. Mississippi River Corp.	-
p. 27.72		-
ep.28 72	Filed Interr. of Pltffs to Deits Missouri Facilite Marie Deits Missouri	+-
\	T.C. Davis & Alomas Milbank	+
1 Oct. 5,72	Filed Pitffs'Suppl. Interrogatories. Filed Missouri Pacific Railroad Co's Suppl. Answer to Tiffs' Suppl. Interrog.	+-
Oct. 10.72	Filed Missouri Pacific Railroad Co's Suppl. Aswer to Told On 1/25/73 at 10 7M	BT.
Dec.22-72	Filed Order that a hearing small be the manage of caterming whether the	+-
	in ROOM 506 of the U.L. Courthouse, for the purpose of determing whether the proposed settlement should be approved, etc.etc; ordered that notice of his proposed settlement should be approved, etc.etc; ordered that notice of his	rur
	class mail, etc., and published in The Wall Street Journal once within one w	23
	after entry of this order, Weinfeld, J. (mailed notice).	T
Jan. 12,73	Filed Doft Missouri Pavifid Railroad Co.'s Affdyt.	
Jan.19.73	Clk of Court dated January 17,73 by certified Mail #080108, Special Delivery	
	- 1 C-441 Sto (gent to Judge Weinfel	
. 02 72	raiProposed Sattlement distribution of Stipulation & Agreement of Suttle	abr
	the and Account of M Lauck Walter Supporting Settlement.	-
Jan. 23.73	he - t w of Portion in reply to objections to proposed sections to	4
Jan.23.73	Filed Affdut of John J Burns, Jr. Supporting Sections.	+
Jan. 24.73	Filed Objections to Proposed attlement Filed Notice of Appearance by LeBoeuf, Lamb, Leiby & MacRae, attys for Franklin Na	th
Jan. 24, 73	Lie at the area and and and and and and and and and an	+
	Bank (Missouri Pacific Railroad Co)	-
Jan 29-73	Filed Affidavit by Edward Garfield and Barbara Garfield, Objectants.	-
l'eb.1.73	Filed Defts' Supplemental daply Memorandum.	al
Jan. 30, 73	Filed Affdyt of David M. Day in connection with objections of Edward Carfie'd an	~
	Briara M.Garfield to proposed plan of settlement.	
Jan. 30, 7	Filed Deft Mississippi's Memorandum in support of Proposed Settlement.	
1-n-30,7	Filed Affdyt of Deft Mississippi River Corp("Mississippi") by Everett I. Willis. Filed Affdyt of F.LLce Jones for Deft Missouri Parific R ilroad Co. Robert H. Cra	11
_Jan. 30,7	m C Decide and Thomas is the Dank	
Jan. 30,7	Filed Memorandum of Defts in reply to objection to proposed settlement by	50
Table of the same	and Barbara M. Garfield.	-
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- BETTY LEVIN, ALLEGHANY CORP, AND ROBERT LOVASSEUR VS. MISSISSIPPI RIVER COM MISSOURI PACIFIC RATLROAD CO, ROBERT H. CRAFT, T. C. DAVIS AND THEMS F. 17. Pago-7-Mar. 12,73 Filod Affdyt of Pltffs' Counsel Sheldon H. Elsen, Abraham L. Pomerantz and John Lowenthal 1 support of Proposed Settlement. Mar. 19,73 Filed Affdyt of David W. Peck for Defts. Missouri Pacific Railroad Co. phobart H. Craft, T. C. Mar. 19,73 Filed Affdyt of F.L.Los Jones for Defts. (except Mississippi River Corp) supporting cettle Mar. 19,73 Filed Affdyt of Downing B. Jenks for Defts. Missouri Pacific Railroad Co. Mar. 19,73 Filed Affdyt of Everett I. Willis for Deft Mississippi River Corp. Mar.19,73 Filed Defts' Joint Memorandum in response to requests of Court at 1/25/73 Hearing on proj settlement. Mar. 19,73 Filed Pltffs Levin and LeVasseur's Memorandum in support of proposed settlement. Mar.19,73 Filed Deft Mississippi's Memorandum in support of Proposed settlement. Mar.19,73 Filed Memorandum of Defts Missouri Pacific RR Co, Robert H. Craft, T. C. Davis&Thomas F. in support of proposed settlement.
- Mar. 19,73 Filed Memorandum of law on behalf of Edward Garfield & Barbara M. Garfield, objectants to posed settlement.
- -Mar.19,73 Filed Affdvt of F.Lee Jones for defts (except Mississippi River Corp)
- Mar. 19,73 Filed Defta Suppl. Reply Memorandum.
- Mar. 19,73 Filed Reply Affdyt of Edward Garfield.
- Mar .19,73 Filed Objections of Jacob R. Cohen and Jone Cohen to Approval of Proposed Sottlement.
- Mar. 19,73 Filed Notice of Intention to object by Jacob R. Cohen & June Cohen (atty for objectors)
- Mar.19,73 Filed Letter from William R. Wesson to Judge Weinfeld dated 3/9/73.
- Mar. 19,73 Filed Pifff Alleghany Corp! Notice of Motion before Judge Weinfeld, Room 1106,7/25/72/
- Mar.19,73 Filed Memorandum in support of Pltff motion to compel discovery.
- Par.19,73 Filed intervening pltff Alleghany Corp's Affdyt of M.Lauck Walton .
- "William T. Livingston. Har.19,73 Filed
- " M.Lauck Wilton pur uant to Gon.Rule 9 Mar.19.73 Filed
 - Mar. 19,73 Filed Affdyt of Gilbert P. Strelinger for Missouri Pacific Railroad Co.
- Mar.19,1973 Filed Memorandum of Deft. Missouri Pacific Railroad Co in opposition to Pltffs motion
- pel discovery. Filed Memorandum in reply to Deft Missouri Pacific Railroad Co's Mcmorandum in opposi Mar. 19,73 Pltffs'Motion to compel discovery.
- Kar.19,73 Filed Eappsabeen of Downing B.Jen: by Sheldon H.Elsen on 6/21 and 6/22/72. M/M
- Mar. 19, 73 Filed Deposition of Downing B. Jenks by Sheadon I. Elsen and M. Lauck Walton on 9/20/72. M
- Car, 12, 73 Filed Appendix to Defts' Joint Mamorandum.
 - Mar. 19,73 Filed Stipulation and proposed Order of Defts (all except Mississippi River Corp.
- Mar.19,73 Filed OPINION#39329. This is a motion pursuant to Rules 23 and 23.1 of FRCP for approval settlement agreement of a class action, as indicated , etc. Settlement is croroved an judgment may be entered accordingly. Weinfeld, J.
- 1. 2.5,73 Filed Petitioner's Notice of Motion to amend opinion& Judgment returnable 4/10/73(Coor)

Wein

BETTY LEVIN ET AL VS.MISSISSIPPI RIVER CORP ET AL . 67 CIV. 5095

- Apr.5,73(Cont'd) in Room 705,2:30 P.M. before Judge WeinfeldeAffdvt of William R. Wasson in support
- Apr.13,73 Filed MEVO END. on Notice of Motion to amend opinion & Judgment dated 4/5/73. Motion is denied. All parties acknowledge that objector Wesson has a right of appeal from the ordered entered herein or the judgment to be entered thereon. Weanfeld, J. mn
- Apr.13,73 Filed Memorandum in opposition to motion of William R.Wesson to Amand Opinion and Judgment.
- Apr.16,73 Filed Letter from Michael Paul Cohen dated 4/11/73 to Clk of Court giving correct address to be reflected on docket sheet.
- May 10,73 Filed Notice of Appeal from Denial of Motion(Mailed Copies)
- May 10,73 Filed Notice of Appeal from Judgment (Mailed Copies)
- Hay 2,73 Filed Deft.Missouri Pacific Railroad Co. Craft, T. C. Davis&Milbank Notice of Settlement before Judge Weinfeld on 4/24/73.10:00 A.M.
- May 2,73 Filed ORDER AND FINAL BUDGMENT. Ordered that terms and prov. of Stip of Settlement to Misse
 Pacific Railroad Co and member of class are reasonable, etc.; complaint & Amended
 Complaint of Betty Levin, complaint & Amended Suppl Complaint of Alleghany Corp. Report

LoVasseur are dismissed as against all defts with prejudice and without costs to en party, etc as indicated. Weinfeld, J. Affdvt of Dorothy M. Strickler.

JUDGMENT ENTERED. 5/2/73.

ENT. 5/17/73 mm

May 22-73 Filed change of a ddress of Donovan, Leisure, Newton & Irving to 30 Rockefeller Plazz; II Tele. 489-4100.

Jun 1-73 Filed transcript of Record of Proceedings of Jan. 25, 1972.

Jun 6-73 Filed stipulation designating exhibits and certain documents to be transmitted to the U.

Jun 6.73 Filed Notice to Docket Clerk that record on appeal has been transmitted to USCA, 2nd Cir on 6/6/73.

Jul 9 - 73 Filed true copy of USCA order affirming judgment of District Court on J. Weinfelds
Opinion 36012 - Judgment entered - Clerk

Mov.20-73 Filed Notice of Motion to sat aside Judgment and order of May 2, 1973 roturnable 11/2

Nov-23-73 Filed stip. and order adj. above motion to Dec-4-1973 -- Weinfeld, J.

Nov.30-73 Filed Memorandum in Opposition to Motion to set aside Judgment

Nov. 30073 Filed Affidavit of M. Lauck Walton in opposition to the petition of Michael Moumousis

dated now 20, 1973 setting south of granding from Judgment, etc. Motion in de net, I Weigheld, J. m/n Judgment,

(per (g. 9)

DATE	~	PRO	CEEDINGS	1. 1. 1.		
Dec. 19-7	3 Filed stip. and	rderthat the fo	rms to 1	be used	for the to	nder offer
	to it of share	deft. Mississip s of Commons St	ock of l	Missour	Pacific !!	ailresi to
ē	as contemplate	d by Sections 1	.2 and	1.3 of	the settlem	ent gereemen
· · · · · · · · · · · · · · · · · · ·	as Exhibits AR	1972 shall be s and C.So order	ed. Wei	nfeld.J	. (upon the	nexed hereto
	that the facts	set forth in t	he attac	ched do	cuments are	accurate au
4	roving the set	ry to the terms	nt.	order e	ntered by t	his Court sp
Jan. 2-74	Filed petitioner	Michael Moumous	is notic	ce of a	peal to th	e USCA
' 	entered on May	r's motion to s	ion hav	ing hee	inal order	and Judgment
	and the denial	having been en	tered or	Dec.	7,1973. (cop	les mailed).
Mar 1,-71						
	Filed stip, and order So ordered, Wein	1810.0				
Mar.4-74	Filed netitioner's af	fdt. and notice of	motion f	or an or	ler-modifying	the order-
	etc. ret. on: Mo	rch 12 1071	973 appro	ving the	etip of sot	bloment,
Mar. 11-7	Filed memorandum of	oltfs. Levin and Lo	Vascour :	n opposi	tion to potis	fon of
Non 72 71	Napoleon G.Gabrie Filed brief of counse	for pltfa Levin	nd Levan	neur in a	upport of the	dr
	annitication for	allowance of fees a	and expeni	808.		
Mar.13-74	Filed pltfa. Lovin and	Levascour affit. Pacific RR Co. and	and noth	of moti	on for an or	or directing.
- 1	applicants Orans	Elson and Postei	and Por	erants Le	by and Block	and Haudek
· · · · · · · · · · · · · · · · · · ·	the sum of \$2,00	0,000 as lugal fee	and the	sum of	322,422.06 for	r thir
-Hav. 13-7	Filed pemorandum in	to one March 26,19		of pltf	Allerhams Co	n. for ferd
····	end expenses.					
-Har -13-74	Filed pltfs. Alloghamental pltfs of oo	meel fees and expe	notice d	red-ret.	-for-allowand -ons-Harch -2:	5,197h
Mar. 20-74	Filed memorandum of co					plef.
Man 22-71	Filed Napoleon C. Gabi	and attys. for plts		and Leva:	36Ur	
	iled memo end, on peti	tioneris motion de	tod-Hard	harris.	for an order	modifying
	the order and final ju	adgment dated and e	ntered-Ma	A . 72.	3-This moti	on 11
1	without merit, etc. as					
Jun 18-74	Filed petitioner	which deried ar	pellant	me usca	r to amend	inal order
1. 111. 3	judgment so as to	make said judge	ent not	bindin		
Jun 26-7	and others similer					Tara Caraca
Juli 20-7	In the sum of \$85	0,000 is grante	d.The c	ourt de	ems\$1,750,0	00 as failt d
1	In the sum of \$85 reasonable to the are also entitled	atty for the	pltfs.	Levin	and Levasse	RU. These cou
1 No. 1	of \$22,422.06.	Judgment may be	entered	accord	ingly.Weinf	eld.J. a/n-
1111 41	(Mario					
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					,	
D. C. 162 Cris	ninal Continuation Sheet	,			1.	· · · · · · · · · · · · · · · · · · ·

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, N°			
DATE	PROCEEDINGS		9
Jul 3-/4	Filed JUDGMENT # /4,567 ORDERED	that the defts. M	ississippi River Corr
921 - 9 - 1.5	1 William Doctific DR Co nav 1	the sum of abou. U	of tor legal fees
	I I dispursements to otlt Alleg	hanv Corp. to be	cald in equal parts
	1 - L tordored that the de	ATTS. MISSISSIDUL	River Corb. and
	Missouri Pacific RR Co. pay the	sum 01\$1,/50,000	as legal fees
1	and the sum of \$22,422.06 as dis	bursements for a	amagante Lavoy Haudel
**	jointly to Messrs. Orans, Elsen a	he such corn Wat	ofeid I m/n
	& Block to be pd. in equal parts Judgment entered, Clerk. entered	on docket H9/74	mreid,5. m/n
) ·	Judgment entered, Clerk. entered	oll docket 7/3/14:	
5 Jul 23-74	Filed Notice of Appeal for Petitioner, to	U.S.C.A. from the I	inal judgment of 1/3/14
& Aug. 1-14	I Filed appellants Jacob Cohen and J	ane conen norres	or appear to the
	USCA from the judgment requiring	dett. Missouri P	actric RR topay
1	legal tees and disbursements to	plei. Alleghany, Co	th. entered ou anth
£	3,19/4. (copies mailed).	aumun145 +bo	ant of \$250 00
Aug. 1-/4	Filed bond on undertaking for costs	on appearin the	ant. of \$250.00
·	by the Fidelity and Deposit of M	aryrand.	
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67 Civ. 1991 (AV)

MOTION OF COTION
To set acide judgement and order of
May 244, 1973

EMOFFICE COUNTY SCHOOL OF HIM YOU.

SHOTY INVEN, ALLADIANY CORPORATION and ROBERT LIVASSUER,

Plaintiffa,

-asainat-

MISSISSEPPI RIVER CORPORATION MISSOURE PACIFIC MAILTOAD CO BANK, ROBERT H. CLAVE, T. C. DAVID and THO AS F. MILLSALE,

Defendants.

Sir:

Filiass what Motton, that the underrugued, appearing for Petitioner Michael Moumousis, will have this honorable Court at the Courthouse, Foley Aquare, Her York, N.Y. in Room 1305 thereof on the 27 day of Hovenber 1973 at 2115 PM o'clock or as soon thereafter as counsel may be heard, before the Honorable Edward Weinfeld, United States District Judge, for an order (a) setting aside the order and final Judgment dated and entered May 2nd approving the stipulation of settlement of the above captioned case and the recapitalization plan for Mo Pac, and (b) either reinstating the above captioned suit, or dismissing the said suit, or approving the Vesson Plan of Settlement, and (c) granting such other and further relief as to this Court seems just and proper, for the reasons set forth in the annexed petition.

Yours very truly,

DATED: Prooklyn New York

Attorner for orthitoner
Michael Houmousis
On Lower House
All Print Street
Insorting, Lower Com. 21:13
(61) 201-000

To:

SHELDON H. ELSEN, LEWIS SHAPIRO,

Of Counsel.

JOHN E. TOBIN, M. LAUCK WALSON, GLENN S. KOPPEL,

Of Counsel.

ABRAHAM L. FOMERANTZ, WILLIAM E. HAUDEK,

Of Counsel.

EVERETT I. WILLIS, ROBERT S. WOLF, GERALD E. ROSS,

of Counsel.

DAVID W. PECK, MICHAEL M. MANEY, CARROLL E. NEESEMANN, MARCIA B. PAUL,

Of Counsel.

ORANS, ELSEN & POLSTEIN
Attorneys for Plaintiff-Appellee
Betty Levin,
One Rockefeller Plaza,
New York, New York 16020.
(212) JU 6-2211

DONOVAN LETSURE NEWFOLL & THVIRD Attorneys for Plaintiff-Appelled Alleghany Corporation,
30 Rockefeller Plaza,
New York, New York 10020.
(212) 489-4100

POMERANTZ LEVY HAUDER & BLOCK Attorneys for Plaintiff Appellee Robert LeVasseur, 295 Medison Avenue, New York, New York 10017. (212) 532-4600

DEWEY, BALLANTINE, BUSHEY,
PALMER & WOOD
Attorneys for Defendant-Appellace
Mississippi River Corporation,
140 Broadway,
New York, New York 10005.
(212) DI 4-8000

SULLIVAN & CROMWELL
Attorneys for Defendants-Appelless
Missouri Pacific Railroad Company,
Robert H. Craft, T. C. Davis
and Thomas F. Milbank,
48 Wall Street,
New York, New York 10005.
(212) HA 2-8100

THIT DEED BEING DESTRICT GOOD SOURGERS, DESCRIPTION OF REAL YORKS

DESTY ASSETS, ARRESTMENT COMPONENTION and HOLDER LEVELOUER,

Fludotaffs, 67 Civ. 50,9 (11)

-againat-

MISSISSIPPI RIVER CORPORATION, MISSOURE FECTFAC MATERIALS COMMENT, ROBUTT H. CHAFT, T.C. DAY S SAC 210-AS F. MICHAEL

PETTETO

Defeadents

" Michael Housewais being duly soon petition this court and deposes and states as "ollow .

- 2102 01d H111 Rend. (1) That he resides at Spring bake Heights New Jersey 07762 and is an owner of Class D stock of the introduction Pacific nailread Company, (No Inc).
- (2) That this honorable court in its order and final judgement dated and entered May End, 1973 retained "judiediction of all matters respecting the consumetten of the settlement of this action pursuant to the Stipulation of Schlement and for the purposes of entertaining applications for attorneys! Yees and expenses by counsel for plainti's Botty Lovin and Robert Le Vesseur and by plaintiff Alleghany Corporation".

RELIEF SOUGHT

(3) Potitioner respectfully requests, in the interest of justice, and on newly acquired information, not made avoit. able to the court prior to this time, showing the intercents of the plaintiff Alleghany as bring in direct opposition to those of the r presented No Pac Class B Stockholders, the Collegias: (a) the setting spide this order and shoul jadement out 6 and untered may 2, 1973 approving the Edipoletics of College ont and the effect of all abanquent weter of the sertice to I give at

or distriction the said out, or approximation decrees the state of the said out, or approximation decrees the said out.

RESERVED RELATED DOBUTT-ALVECTARY'S TOUTLAST IN THE LESS CONTRACTORS OF THE LATE OF THE PROPERTY OF THE CONTRACT OF THE THEORY AND THE CONTRACT OF THE THEORY AND ARE CLASS IS SPOCE OF THE CASE OF TH

(%) This Court in the opinion on Page 36 stated: "Allerbay, relociate most us the owner of 50% of the Charachard notice assumed that it negotiated to obtain the limb possible terms for that promp vis- a mis the chase A characharders". The court also on Page 31 stated that the interest commandation of the characharders were" satisficate automated assignt".

was unaware, as was the potificant and other Class I stock because it stock in disposing at its class I stock in paramount, and was not representative, or beneficial to potitioner and other Class D stockholders.

(5) On January 27th, 1970 the Lor outhorized Alleghany to acquire Jones Motor Co. And. and the transaction was
consummated on April 30, 1970, deepite the fact that Alle hony
violated Section 3(4) of the Facerstate Conserve Act. This
transaction started as early as Sept. 4, 1968 when the agreement
to purchase Jones was entered into. / Inadequacies of Protection
for Investors in Penn Central and other ICC - Regulated Conpanies - Staff Study for the apscial Subcommittee on Investigations of the Committee on Interstate and Foreign Contages,
H.R. 92nd Congress, July 1971 Staggers Consistes, Coult, Print.
C.59-2970, pages 26-33 1/2 Pasitioners Exhibit A attached.

the approval of the enquisition of Jones by Alla hall an Follows: "Still further, in accordance with Allambany's superation, as shall require as a condition for to manuation of the proposal that the trustee-ship of Allighany's No Fac securities as perviously ordered by the commission, be continued subject to the continuing jurisdiction of the Commission. Alleghany Composation Control and Purchase-Jones Motor Co., Inc. - and Control arise trucking Company No. MC-P-10/181, 109 MCC 201, 750, decided James 27, 1970; Fetitioners Publish B attached.

- (6) A primary reason for the Allegheny acquisition of the operating rights of Jones was to leader its tex burden and, be able to 'retain and resinvent but carriage and would not be subject to the 70-percent penelty tax". A supra 109 MCC 331 at pages 339 and 3427. Potitioners Exhibit 6 attached.
- (7) Co Ostober 6th 1973, Alleghany through its atterney M. Lauck Walton, Eq. filed a brief with the Economic reference to an application scaking the Economic approval of the recapitalization of Mo Fee as provided for in the settlement agreement and judy ment of this court in the instant case.

 Petitioner attaches a copy of pages 9 and 10 of said brief (Exhibit D) wherein Alleghany argues that the termination of its interest in Mo Pac Class B stock would be in keeping with the public interest, the prior order of the ECC (Jones Motor Co. Inc. 109 MCC 305 supra), and would save Alleghany from great financial injury, and relieve the ECC of the burden of supervision of the trust of Alleghany's Mo Pac stock.
- (8) It is submitted that Alleghany's role as a class representative for petitioner and other No Par Class B stock-bolders was not to represent its own interest, or that of the ICC but the interests of the Class B stockholders.

Polition a and others similarly situated to be besided by the settlement or the recepitalization but the harmed in the integrity of their property eight and exposed to confidentary teration in that the cash payment of (850 per shape is addiced to be breated as ordinary theore.

(9) It is indeed strongs that potitioner and other similarly situated would be better off and if the worst had happened vir. dismissal or loss of the original suit. If such happened petitioners property and equity to no Pac voold be interest and unchanged. The authorist is worse than the worst, in that petitioners equity is reduced from 65.5% to 95.5% and petitioners, and other class 3 stockholders, while Alle have attended to the the tax shelter as an operating carrier, is emposed so to the down taxation on the 1650 per share case settlement.

OGNOBUSED REOL AROYS TACTS: ALL GUARDS BY THE FURTHER LOT AS A RESULT OF THE PURCLESS OF JOINES HOTOR OF AND THE OTHER OF THE DELTH AS A RESULT AND THAT IS DOUGHT OF AND THE ART THE DELTH OF AND THAT AND THE BEST AND THE GRADES SUCT AND THE ENTERMENT.

- (10) The positing settlement and recapitalization of the Pac banchits Allegony and not the represented Class 3 stockholders of which petitioner is one. Petitioner and other like him would have been better off financially if Alleghany had dropped the suit or had even lost it.
- (11) Alleghapy, due to the ICC order of 1970 year no longer the real party in interest to continue the suit, each less settle the suit, Alleghamyr No Pac stock was in trust under the jurisdiction of ICC and Alleghamy required the approval of ICC to continue the litigation, and no such approval was given.
- (12) Decause of the facts as stated in item (11) supra the court lacked the jurisdiction and adjudicatory power to continue and for mattle the matt.

- (13) To hight of All large out shalt east a contained the interest and those of positioner and other to has the settlement seried Ahaltechang but not Class I stockholders.
- (14) In fairness Alle bany should have disclosed its special interest in the acttlement to the court and to the above-holders in the proxy statement. If it had so disclosed the court and the standards would not have been misled.
- (15) The cettlement constitutes the taking of gottitioners property without due process of law, contrary to have 25 of MRCP, for the benefit of Alleghany.
- (15) The courts settlement under Rule 23 of Thep so interprets this rule of procedure as if the rule created substantive rights, a situation beyond #11 constitutional power of a Federal Court.
- (17) This Court must in fairness stop this unfair taking of petitioners property, and that of other Class D stockholders.

THE WESSON PLAN IS THE SOLUTION IN THAT IT HELPS ALBESTANT DIVET INSTER OF MO FAC STOCK, CIVES COUTROL TO MISSISSIPPI, AND ALLOWS THE CLASS B STOCKHOLDERS TO KEEP HIS EQUITY WITHOUT CONFESCATORY TAX-ATION.

ported, nor could it be attempted, to be attained in the settlement hearings. The figure of \$2450 per share was, as this
court stated, for settlement purposes only. There is no quastion but that there is a grave question as to the true value
of Class B stock. Politioner subscribes to the calculation
of Mr. Cabriel in his brief submitted to the ICC at its hearing on this recapitalization plan. Therefore, annexed her to
and made a part of this petition (Exhibit B) is a copy of the

value of Class B stock as being (ch, 3.0.00 per chare. 100 if this lique could be Chated, nobody questions the fact that the proposed recapitalization reduces the Class B stock-holders equity in No Pas from 53.5% to 25.5%.

) . . , . . .

- (19) In. Mccson, a class D stockholder and a protector of the recapitalization plan, has proposed an excellent practical and fair colution to the problem facing the parties and the court. A copy of this proposal is assemed hereto and made a part hereof (Athibit F), the papers bein; a part of her was testimony before the ICC in its hearing this sept. 19th on the proposed meanitalization.
 - (CU) Under the West pice:
- (a) Alle thang will be able to dispose of its House stock at the price acceptable to them of \$2450 per charm, and at the same time.
- (a) Likebiscippi firms Corporation could obtain [.. A] voting control of Mo Pac,; e...
- (c) Petitioner and other Class B stockholders of Mo Pae would retain their equity in Mo Pae undisturbed, and would not be subject to the condisentory tax burden which the proposed court approved plan imposes.

Wherefore petitioner respectfully prays that this court will come to the aid of the small investor, protect his property rights, and require fairness and openness on the part of the large composate investor by (a) quanting an order d claring the settlement agreement and the proposed recapitalization of Mo Pac, and all acts of the parties taken on the basis of the said to be locally void because of lack of proper representation in Alleghappy in its failure to make full disclosure of its ownering self-interest; (b) either reinstating or 61 mic. in the

ord that suit, exproving the training that (a) for mat other and further restor as to the court score in that propos.

Dat 6:169 - 1010

Richael Moumousis

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FURALL OF HYD TORKS

On the AS and of how. 1979
Hichael Koumousis appared
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INADEQUACIES OF PROTECTIONS FOR INVESTORS IN PENN CENTRAL AND OTHER ICC-REGULATED COMPANIES

STAFF STUDY

FOR THE

SPECIAL SUBCOMMITTEE ON INVESTIGATIONS

OF THE

COMMITTEE ON
INTERSTATE AND FOREIGN COMMERCE
HOUSE OF REPRESENTATIVES

(92d Congress)



U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON: 197.

59-2070

inclusive, and Section 20a(2) to (11), inclusive, of the Interstate Commerce Act *

The ICC has not "otherwise ordered." 99
If the Investment Company Act had been determined to be applicable to the Pennsylvania Company, all of the following prohibitions of the Act would have been specifically violated:

1. transactions between affiliates without the prior approval of the SEC, especially transactions involving the transfer of assets;

2. excessive management compensation;

3. improper allocation of expenses between parent and subsidiary company;

4. loans to a parent holding company by a subsidiary;

5. guaranty by a subsidiary of loans made to the parent holding company by a third party;

6. sale of securities without prior approval of the SEC; 7. issue of senior securities such as preferred stock; and

8. issue of excessive debt. 100 Needless to say, each and every one of these prohibitions was violated, but the activity was not unlawful because the Investment Company Act was determined to be not applicable. The Investment Company Act was passed to prevent exactly the abuses witnessed in the Penn Central situation. In retrospect, it must be concluded that the regulation of the ICC has been woefully inadequate with consequent injury to investors and to the traveling public.

2. Alleghany Corporation

More than any other single instance, the Alleghany Corporation highlights the "overlapping and underlapping" of jurisdiction over investment companies under the Investment Company Act of 1940 and the Interstate Commerce Act. Between 1956 and 1959 the SEC vigorously but unsuccessfully sought to extend its regulatory jurisdiction pursuant to the Investment Company Act over Alleghany Corporation. The exemption provided by Section 3(c)(9) and the order of the ICC that Alleghany was a carrier effectively thwarted the SEC in its endeavors. After the Supreme Court had determined that Alleghany should not be subjected to the conflicting jurisdiction of two regulatory agencies and that the statutory jurisdiction of the ICC appeared parameters legislation was proposed to close the legislation appeared paramount, legislation was proposed to close the loophole. In appearing to oppose this legislation, counsel for Alleghany argued that the proposed legislation was, in effect, a bill of attainder because Alleghany was the only company which would be affected. Whether or not such was the case in 1959, there are enough companies besides Alleghany presently relying on Section 3(c)(9) to warrant closing this loophole.101

Alleghany was incorporated on January 26, 1929. It became one of the first companies to register with the SEC under the Investment Company Act of 1940 and it continued to be subject to the Act until

^{*}It should be pointed out, however, that although the disposal of the Wabash could have been a basis for rescinding the 1942 order, the Pennsylvanis Company continued to control the Detroit, Toledo & Ironton Railroad Company and the Toledo, Peoria and Western Railroad Company, both common carriers by

railroad.

100 Hearing on "Penn Central Transportation Company: Adequacy of Investor Protection" before the Special

Subcommittee on Investigations of the Itouse Committee on Interstate and Foreign Commerce, 91st Cong., 2d

Sees. 109-120 (1970)

International Hillities Corporation, which was represented on the Board of Directors

Sess. 109-120 (1970).

33 For example, International Utilities Corporation, which was represented on the Board of Directors of Penn Central, obtained an order terminating its status as an investment company subject to the Investment Company Act. of 1940 as a result of its acquisition in 1965 of Ryder Truck Lines. SEC Investment Company Act Releases Nos. 4306 and 4325.

October 4, 1945. At that time, the SEC terminated Alleghany's registration as an investment company because as a result of its acquisition of control of Chesapcake and Ohio Railway Company it "had become subject to regulation under the Interstate Commerce Act and had thus ceased to be an investment company by reason of Section 3(c) (9) of the Act which excludes from the definition of investment company any company subject to regulation under the Interstate Commerce Act.'

At that time, 86 percent of Alleghany's total assets of \$83 million were invested in securities of carriers and only about 5 percent in

securities of non-carrier issuers.

In 1949, Alleghany acquired control of Investors Diversified Services, which is now the largest mutual fund complex in the United States with assets in excess of \$6 billion. In 1955, Alleghany acquired control of the New York Central Railroad but continued its policy of investing in non-ICC regulated securities so that by 1959 only 22 percent of its assets were invested in carriers. This policy, interestingly enough, has included a significant investment in Manufacturers Hanover Trust Co.

Following the completion of the Penn Central merger on February 1, 1968, Alleghany and its related interests constituted the single largest block of stockholdings in Penn Central's common stock.102 Thereafter, Alleghany asserted it continued to hold carrier status until that status was revoked by the ICC and, therefore, it considered itself excluded from the definition of an investment company by reason of Section 3(c)(9). Recognizing, however, it was no longer in control of a carrier, Alleghany registered with the SEC as an investment company on April 10, 1968. It stated in its registration statement that it was registering under the Act to eliminate any uncertainty that might exist as to its status as a company subject to regulation under the Interstate Commerce Act and to eliminate any possibility of liability for doing business as an unregistered investment company.

Alleghany then embarked upon a series of transactions intended to remove the company from under the provisions of the Investment Company Act. On September 4, 1968, Alleghany entered into an agreement whereby it bought virtually all of the outstanding stock of Jones Motor Co., Inc., a motor carrier subject to ICC regulation. Because the transaction required ICC approval, all the shares of Jones purchased by Alleghany were deposited in a voting trust with Marine Midland Grace Trust Co. of New York as "independent

voting trustee."

In registering with the SEC, Alleghany had disclosed its intention to assume motor carrier status, but did not solicit and receive stock-holder approval until April 25, 1969. Thus, approval was obtained only after Alleghany had already made its investment. Certainly, a question of effective stockholder approval is raised in view of the SEC's position in *The Equity Corporation*. 103

On January 27, 1970 the ICC authorized Alleghany to acquire

Jones and the transaction was consummated on April 30, 1970. The ICC found that Alleghany's acquisition of control had clearly violated Section 5(4) of the Interstate Commerce Act but, nevertheless, found the acquisition to be "in the public interest." As in several other

¹⁰² As of April 3, 1969. Alleghany, its controlling stockholder and Investors Diversified Services had a combined holding of 4.05 per cent of Penn Central stock and formed the largest single block.
¹⁰⁸ SEC Investment Company Act Release No. 6000.

similar situations, the ICC chose to overlook action by a carrier which might reasonably have been construed to be at least a misdemeanor under Section 10 of its Act. It rewarded the carrier for violating the Interstate Commerce Act by permitting it to retain an investment made in violation of law. Of course, at no point in its consideration of the acquisition did the ICC consider the effect upon investors because of a loss of regulatory control by the SEC. This illicit acquisition cost Alleghany approximately \$28.8 million. On a consolidated basis, this represented approximately \$28.8 million. On a consolidated basis, this represented approximately 12.5 percent of its total assets, but it was sufficient to permit Alleghany to slip from under the regulatory controls of the SEC and fall within the pseudo-regulation of the ICC.

VIII. OTHER MATTERS AFFECTING INVESTOR SECURITY

In analyzing the adequacy of investor protections, as viewed by the ICC, the staff has concluded that because of their potential for injury to the public interest, certain other matters should properly be the subject of separate and more detailed study. Those matters include:

1. CONGLOMERATES

In March, 1969 the staff of the ICC submitted to the Commission detailed studies of the conglomerate merger activity within the rail and motor carrier industries. Among other things, the staff pointed to the Commission's power inherent in Section 20a as a potent means for controlling what was becoming a rapidly accelerating process of diversification. In this regard, the staff raised the point that—

Management [of the conglomerate] may very well strip the carrier of additional assets reducing it to a corporate shell and then dispose of it.

Ironically, the accuracy of this estimate has already been brought home with the announcement by Northwest Industries of its intention to dispose of its transportation subsidiary, the Chicago and Northwestern Railway. The railroad had been the initial company around which the holding company was capitalized and launched. Northwest Industries, as the parent holding company has availed itself of the tax benefits and credits of the subsidiary railroad to reduce its own tax liabilities without, apparently, any offsetting benefit to the railroad. Now, with a significant portion of the railroad's real estate investments sold off to maintain the company's dividend policy and the bulk of the tax advantages already written off, the railroad is for sale.

Although the ICC has prepared its conglomerate merger studies, it has not demonstrated an enthusiasm for implementing the staff's recommendations. The Commission sought and received in the Emergency Railroad Transportation Act of 1933 the authority to regulate holding companies, but when actually confronted with a patent violation of a significant prohibition in that legislation, it ignored the original legislative purpose and ratified the unlawful action.

Clearer public disclosures by conglomerates with intelligible and accurate breakdowns of gross and net incomes by product lines and lines of business are needed. A reporting system for conglomerates

during the period of the trust. Prior to consummation of the transaction proposed herein, Alleghany shall submit for approval of the Commission a plan showing how it intends to effectuate such trusteeship. While undoubtedly the divestiture of Penn Central shares by the trustee may have certain tax consequences, i.e., either the sale will result in a profit or a loss, Alleghany may avoid the tax consequence by electing not to consummate the proposed transaction. Further, the record before us indicates that the trustee should experience little difficulty in disposing of 390,130 shares of Penn Central now owned by Alleghany. Contained in the affidavit of Fred M. Kirby, previously referred to, is the following statement:

15. As of April 9, 1969, the date of the aforesaid Application under \$5, the total amount of the capital stock of Penn Central owned by the funds sponsored by IDS /Investors Diversified Services, Inc./ was 1,020,000 shares or approximately 4.23% of the total amount outstanding, all of which were held for investment purposes only and not for purposes of control. As of this date /September 30, 1969/, all but 391,900 of said shares, representing approximately 1.63% of the Penn Central capital stock outstanding, have been sold.

We will further require as a condition to approval that all inter-locking directorates between Alleghany and Penn Central, its subsidiaries, and affiliates be rerminated. Prior to consummation, proof of such termination shall also be submitted to the Commission. Chesapeake & O. Rv. Co. Purchase, 2c1 i.C.C. 239. Still further, in accordance with Alleghany's suggestion, and our own independent evaluation of the situation, we shall require as a condition for consummation of the proposal that the trustee-ship of Alleghany's MoPac securities, as previously ordered by the Commission, be continued subject to the continuing jurisdiction of the Commission. The Commission in the future may either in response to a petition or on its own motion institute an investigation to determine whether the trust should be continued or whether Alleghany's divestiture of MoPac securities should be required.

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The Penn Central shares not owned by Alleghany, but controlled by Fred M. Kirby and Allan P. Kirby, Jr., as coguardians of the property of their father, Allan P. Kirby, present a special problem. The 390,130 shares of Penn Central owned by Allan P. Kirby represent 1.62 percent of the outstanding Penn Central shares. While Fred M. Kirby and Allan P. Kirby, Jr., are by the terms of the conditions imposed relating to interlocking

14

newly issued common stock of Jones, and Jones will have no other

capital stock outstanding.

One of the primary reasons presented by Alleghany for acquisition of the operating rights of Jones is to lessen its tax burden. Such burden arises from the fact that Allan P. Kirby, as of February 28, 1969, was the beneficial owner of 4,084,813 shares, or 56.21 percent of the outstanding common stock of Alleghany. Alleghany is, therefore, for Federal income tax purposes, considered a personal holding company since one person (less than 5 individuals) owns more than 50 percent of its stock and has "personal holding income," (60 percent or more of adjusted gross income consists of dividends and interest) and is therefore subject to a 70-percent penalty tax on the "undistributed personal holding income." Alleghany does not want to distribute all such income to avoid the tax. With Alleghany the recipient of the operating revenue generated by its Jones Motor Division, it alleges it would be an operating company rather than a holding company for Federal tax purposes. It could then retain and reinvest net earnings and would not be subject to the 70-percent penalty tax.

Evidence of past operations by Jones under its operating rights is reflected in an abstract of shipments showing all shipments transported in January 1969. The traffic handled consisted of a wide variety of commodities, showing service to points through-

out Jones' authority.

In its verified statement filed on October 1, 1969, Alleghany stated that as of February 1, 1968, the date of the Penn Central merger authorized by the Commission in Pennsylvania R. Co.—Merger-New York Central R. Co., 327 I.C.C. 475, Alleghany received and still holds 196,195 shares or 0.81 percent of the 24,104,-708 shares outstanding of Penn Central stock. In addition, Allan P. Kirby, controlling, stockholder of Alleghany, received and presently holds 390,130 shares or 1.62 percent of the outstanding Penn Central shares. Combining their interests, Alleghany and Kirby together own 2,43 percent of the outstanding Penn Central stock. Alleghany's shares in Penn Central are held in its own name but the Kirby shares are among those held in the name of Sigler and Company.

Alleghany is also the controlling shareholder of Investors Diversified Services, which serves as an investment advisor and distributor for a group of mutual funds. As of September 30, 1909, these mutual funds held 391,900 shares or 1.63 percent of the outstanding shares of Penn Central. It is alleged investment

109 M.C.G.

party to the application before the Commission would have had jurisdiction to approve the merger, citing U.S.v. Marshall Transport Co., 322 U.S. 31. With the consummation of the Penn Central merger, it is alleged that the holdings of Alleghany and the Kirby family in Penn Central have decreased, as have their membership and influence on the board of directors. In regard to the question raised by the Commission as to whether Alleghany is affiliated with Penn Central within the meaning of section 5(6) of the act, Alleghany maintains that a mere minority stock ownership or minority representation on the board of directors alone does not give rise to section 5(6) affiliation. Instead, it is argued such relationship ordinarily arises from the existence of a financial or business relationship with the carrier. Alleghany alleges it has no commercial, financial, or other arrangements of any kind with Penn Central, has no control over Penn Central operations, and holds less than 10 percent of the sears on the Penn Central board. It is further alleged that since the investment in Jones is of almost equal value to that Alleghany already has in Penn Central there will be no economic motive to manage one in the interest of the other. If its argument that it is not affiliated with Penn Central within the meaning of section 5(6) is accepted, Alleghany points out the proviso of section 5(2)(b) of the act is not applicable.

As to whether acquisition of control of Jones is consistent with with public interest, Alleghany claims that public interest includes not only direct benefits to the shipping public but also indirect benefits through strengthening of the financial condition of the carrier involved, leading to longrun economies for the public. It is readily admitted the original intention in acquiring Jones was to avoid classification as a personal holding company under the Internal Revenue Code and thus to conserve funds which would otherwise have to be paid under the penalty tax provision. Still, it is argued the funds so saved will be available for improvement of Jones' carrier operations. It is claimed that it is in the public interest to have the union of a company having substantial financial resources with a carrier allegedly having a large, sed for cash to successfully continue its service. It is alleged that Alleghany's tax savings will make available to Jones approximately \$8,815,000 between 1969 and 1973. This will allow Jones to improve plant and equipment and achieve a growth rate not possible without the help of a company such as Alleghany. In support of its position that it is in the public interest for a company to realize tax savings if passed on to the carrier being acquired, Alleghany cites Quinn Freight Lines, Inc.-Control and Merger, 87 M.C.C. 257. 109 M.C.C.

share that Alleghany will receive. To the extent that Alleghany's majority position (which carried with it the power to veto certain corporate actions) has any "premium" value, that "premium" is included in the consideration to be received by each and every Class B shareholder alike.

II

THE TERMINATION OF ALLEGHANY'S INTEREST IN MOPAC SECURITIES WILL PROMOTE THE PUBLIC INTEREST

The divestiture of Alleghany's security holdings in MoPac, pursuant to the Plan of Reorganization, would also promote the public interest.

In a prior proceeding before this Commission,
Alleghany's acquisition of the Jones Motor Company, Inc.,
a common carrier by motor vehicle, was approved. Alleghany
Corporation - Control and Purchase - Jones Motor Co., Inc. and Control Erie Trucking Company, No. MC-F-10444, 109 MCC
333, decided January 27, 1970.

The Commission, as a condition to its authorization, ordered that the trusteeship of Alleghany's MoPac securities be continued. The Commission noted "... either in response to a petition or on its own motion [it may] institute an investigation to determine whether the trust should be continued or whether Alleghany's divestiture of

MoPac securities should be required. Alleghany Corporation
- Control and Purchase - Jones Motor Co., Inc. - and Control
Erie Trucking Company, supra, at 350.

Undoubtedly the Commission, in so ordering, weighed the unique characteristics of MoPac Class B stock, including the absence of a broad and liquid market for that security. (See Exhibit #2, Testimony of F. L. Lee Jones.) The Commission was undoubtedly aware that the sale of Alleghany's B shares in the usual way was simply impossible, and to so order would cause great financial injury to Alleghany as well as to the minority Class B stockholders, the price of whose stock would be substantially depressed by the forced sale of the controlling block of B shares.

Furthermore, it is clearly conducive to the public interest that the Commission be relieved of the obligation of overseeing this trust, while at the same time achieving a solution which will not harm Alleghany, which is also a carrier subject to the Commission's jurisdiction.

Clearly, an excellent procedure for eliminating or virtually eliminating Alleghany's ownership of MoPac B stock is that embodied in the Plan of Reorganization.

because the MOPAC Plan of Recapitalization has been made up by Mississippi and her lawyers, and they have hired mercenary experts, lawyers who get paid to testify in favor of MOPAC and Mississippi, and those who are not in agreement with the wishes of Mississippi are not hired to testify. If the ICC decides favorable for section 20a, the MOPAC and Mississippi benefit because the plan of recapitalization has been slanted to be in their favor. Mississippi is MOPAC; Mississippi is the management. The yellow proxy even says that "this proxy is solicited on behalf of the management."

On page 36

Mr. Walton talks about the \$16 million dollars net left for the Class "P", and capitalizing that, he finally comes up with his fact that Class "B" is worth \$2,450...page 37, lines 2, 3 - But Mr. Walton, a railroad lawyer that he is, is forgetting that in addition to the worth of Class "B" of \$2,450 per share based on earnings, there is left out the fact that Class "B" has, as of December 31, 1972, retained income of \$349,192,000, or approximately \$8,775 per Class "B", which belongs to Class "B", because net income is in addition to the assets necessary to satisfy all limities of the MOPAC railroad, including the \$100 per share liquidating value of the Class "A" in the event of liquidation. So all of this \$349,192,000 retained income of MOPAC, as of December 31, 1973, belongs to the Class "B" stock. This value

of \$2,450 per Class "B", when added to the about \$8,775 retained income which belongs to Class "B", amounts to \$11,225 value per Class "B."

*11.255 per Class "B" value. There are additional property values for B.

At December 31,1972 and 1971, according to the Morac 1972 Annual Report on page 21, Consolidated non-depreciable properties, including land and land rights were approximately \$545 millions. This \$545 millions is arrived at in the following manner- These valuations are as of 1934 plus additions and betterments less depreciation to December 31,1972. Since the year of 1934 inflation has more than doubled the value of this property, or approximately \$1,090 Millions. One half of this accrues to the Class B, which according to the Moyae I.C.C. Agreed Plan of 1955 Reorganization the Class B is the recipient of all corporate equity after all debts have been satisfied, including the \$100 per share liquidating value of the Class MAT. One half of \$1090 Millions equals \$545000000.

Therefore Class B has increased in value
Consolidated Retained Income December 31,1972
Total value accrued to Class B
This amount divided by say 40,000 shares Class B
equals approximately \$22,350 per Class B

Plus times carnings of Class B based upon earnings according

to Mopac 2.450
Total value \$24,800 per Class B Mopac stock

One of the solutions to this Mopac problem is to have the United States District Court in Saint Louis help the I.C.C. enforce the Mopac Agreed Plan of Reorganization which is a law of the United States because it was approved and certified both by the I.C.C. and the United States Federal District Court in Saint Louis. The other solution would be to have it resolved under Section 200.

Alleghany has a, sed that they want out, with the possibility of getting approximately \$2,450/share for their
21,243 shares of "B" stock, and Mississippi River Corporation wishes to maintain voting control of MOPAC. I therefore propose that Alleghany sells its "B" shares to MOPAC
for \$2,450/share cash, which shares become treasury stock
for future corporate purposes. Split the "B" stock 20 for 1
and leave the "A" stock the same, giving Mississippi River
Corporation 51.8 per cent voting control, and the minority
stockholders of the "A" and "B", 48.2 per cent voting control.

The advantages of this plan are numerous.

- (1) The equity of the shares will be undisturbed, which fulfills the requirements of "equivalent securities" and "residuary beneficiary of any future prosperity the property may enjoy."
- (2) The railroad will be spending (\$2,450/shere x 21,243 shares =) \$46,045,350 to buy (\$9,000/share x 21,243 shares =) \$191,187,000 of retained carnings, thus gaining frank ED EASTMAN ENTRY ENTRY (\$145,141,650 for 10g treasury, which does not include other large underlying values.
- (3) It will eliminate an expenditure on dividends of (9850/share x 39.731 =) 633,771,350, which is a great waste of the Railroad's funds; for much of it will end up in the hands of the Internal Revenue Service, and be of little benefit to the "B" stockholders because of the dividend's status as current income.
- (4) Alleghany will be out at the #2,450/share price for which it has already bargained.
- (5) Mississippi River Corporation's "A" shares will maintain 51.8 per cent voting control, which in my opinion, is far more than they deserve after the years of denogation which they have vested upon the "B" stockholders.

- (7) The 20 for 1 split will repair an old injury to the "B" stockholders which grew out of the 1954 Reorganization "agreed plan." (See Section III Denegation of Class "B" Stockholders, below.)
- (8) The more balanced voting control should increase the performance of fiduciary obligations of the board and bring to an end the taking advantage of one group of stockholders in favor of another.

III. DENEGATION OF CLASS "B" STOCKHOLDERS.

There is a long history of denial connected with the Class "B" stockholder. This denial has always been vested upon them from above by people in control, and in the position of fiduciary responsibility. There follows a brief resume of some of the major acts of denegation.

Act 1. Denegation of Voting Power.

In the 1954 Reorganization of MOPAC under the "agreed plan," the "B" stockholders lost most of their voting power because the retained earnings and equity of 30 solvent subsidiary companies of the consolidated MOPAC system were left out of the assignment of values to the "B" shares. (Attachment III.) The ICC took into consideration in the "agreed plan" only the Missouri Pacific Pailroad and 24 subsidiary companies which were in receivership. Consequently, the \$130 million in retained earnings and equity values which actually existed for the old common stock was reduced by \$126 million to \$4 million. When the "B" stock was set up at \$100 par value, approximately 40,000 shares resulted instead of approximately 1,300,000 shares. As a

ENTERED SOUTHERN DISTRICT OF NEW YORK

BETTY LEVIN, ALLEGHANY CORPORATION : and ROBERT LeVASSEUR,

67 Civ. 5095 (EM)

Plaintiffs-Respondents

AFFIDAVIT

-against-

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT, T. C. DAVIS and THOMAS F. MILBANK,

Defendants-Respondents:

MICHAEL MOUMOUSIS,

Petitioner.

STATE OF NEW YORK) : ss.: COUNTY OF NEW YORK)

- M. Lauck Walton, being duly sworn, deposes and says:
- 1. I am a member of the firm of Donovan Leisure Newton & Irvine, and am fully familiar with this litigation as set forth in detail in my Affidavit dated January 15, 1973 in Support of the Settlement herein. I make this affidavit in opposition to the petition of Michael Moumousis dated November 15, 1973 to set aside this Court's order of May 2, 1973.
- 2. On information supplied by Missouri Pacific Railroad Co. and the National Quotation Bureau, Petitioner became a holder of two shares of Missouri Pacific Class B stock on or about February 27, 1969, during which month the lowest bid price was \$1,800 per share and the highest asked price was \$2,000 per share. He voted against approval of the recapitalization.

- 3. Petitioner did not appear in person or correspond with this Court in connection with the settlement hearing held on January 25, 1972.
- 4. On information supplied by the Missouri Pacific Railroad Company, the vote at the Special Meeting of Stockholders on June 15, 1973 on the proposed Plan of Recapitalization and Amendment to the Articles may be summarized as follows:

There were a total of 1,865,702 Class A shares eligible to vote at the meeting. Of these, 1,614,453 or 86.5% voted for the plan, and 21,044 shares representing 1.13% of the outstanding A shares voted against. Total Class A shares present or represented at the meeting was 87.7% of the outstanding.

There were a total of 474,902 shares of Class A Stock other than those owned by Mississippi River Corporation and Alleghany Corporation voted at the meeting. Of these minority shares, 453,858, or 95.5% of the voting minority, voted for approval of the Amendment and Plan of Recapitalization. Thus, 4.4% of the voting minority voted against the plan.

There were 39,731 Class B shares outstanding. There were a total of 35,305 Class B shares voted at the meeting of which 33,148 voted for the Plan and 2,157 voted against. The 33,148 shares of Class B voting for the proposal represented 83.4% of the outstanding Class B.

There were a total of 14,062 Class B shares other than those owned by Alleghany which were voted at the meeting. Of these minority Class B shares, 11,905, or 84.6%, voted for the proposal while 2,157, or 15.4% of these shares were voted against.

5. Alleghany was required to trustee its MoPac stock when MoPac came out of reorganization in 1956. Previously, in 1945, the ICC had required in Chesapeake & Ohio Ry. Co. Purchase, Fin. D. 14692 (Div. 4):

"(2) Alleghany and the Chesapeake & Ohio shall deposit with the Chase National Bank of the City of New York as independent voting trustee all voting stocks of carrier corporations subject to regulation under the Interstate Commerce Act, not presently affiliated with the Chesapeake & Ohio system whether now owned or hereafter acquired by either of them, except Alleghany's holdings of the stock of the Missouri Pacific Railroad Company which is now in reorganization under Section 77 of the Bankruptcy Act, as amended." (Sheet 22)

At sheet 3 of the Division 4 report, after noting the nonnecessity of trusteeing Alleghany's MoPac stock because of the status of MoPac as a bankrupt, the ICC added:

"(Should Alleghany acquire any voting stock at the conclusion of the court proceedings, such stock would be covered by the proposals made in the petition of April 13, 1945.)"

That is, any such stock received would be placed in voting trusteeship.

6. In Finance Docket No. 18656, Louisville & Jeffersonville Bridge & Railroad Company, Merger, Etc., Order of March 2, 1955, and with reference to the report of the Division which was made a part of that Order, the Commission said:

"It is ordered, That, subject to the conditions for the protection of employees, and relating to deposit of specified railroad securities with an independent voting trustee referred to in the report aforesaid, . . ."

The application would be approved; and,

"It is further ordered, That the effective portions of the order of June 5, 1945, in Finance Docket No. 14692, Chesapeake & Ohio Railway Company Purchase, etc. be and they are hereby terminated and shall be of no further force and effect."

In the report of Finance Docket No. 18656, 290 I.C.C. 725, 745-746 the Commission stated:

"Alleghany owns securities of the Missouri Pacific Railroad, as shown hereinbefore, but the voting power attached to the ownership thereof is divorced from the securities, and will remain so until a reorganization plan, approved by us and the court having jurisdiction over the bankruptcy proceeding is formally adopted, consummated, and authorized, or if the proceeding is appropriately otherwise terminated. It is our view that if and when Alleghany obtains voting securities of the corporation succeeding the present Missouri Pacific Railroad Company, Alleghany will be required to deposit those securities with an independent trustee nominated by Alleghany and approved by the Commission."

At Page 728 the Commission stated:

"The report in the Chesapeake case shows that in addition to the stock of the Chesapeake system owned by Alleghany, it also then owned stock of other carriers subject to the act, not affiliated with Chesapeake or its system. Among those securities, it owned considerable stock of the Missouri Pacific Railroad Company, the control of which was vested in a trustee subject to the jurisdiction of the United States District Court, Eastern Division, Eastern Judicial District of Missouri, in a pending reorganization under Section 77 of the Bankruptcy Act; . . ."

On reconsideration in Finance Docket No. 18656 order of the Commission on May 24, 1955,

"It is ordered, That the order dated March 2, 1955 described in the first paragraph hereof, be and it is hereby, affirmed;"

7. By its Supplemental Report and Second Supplemental Order of October 2, 1957 in Finance Docket No. 18656 the trustee (Empire Trust Company) and the terms of that trust were approved by the Commission. Copies of the Supplemental Report and Order

are annexed as Exhibit A, and a copy of the trust agreement and its amendment in accordance with the Commission's direction are annexed as Exhibit B.

8. The aforementioned trust continues today in the same form as originally approved. In June of 1967, the trust was extended for an additional ten year period by agreement between Alleghany and the Bank of New York (successor to Empire Trust). By an Order of August 11, 1967 in Finance Docket No. 18656 the Commission approved the substitution of Franklin National Bank as a substitute trustee.

By its Order of January 27, 1970 in No. MC-F-10444,
Alleghany Corporation-Control and Purchase-Jones Motor Co. Inc. And Control Eric Trucking Company, annexed as Exhibit C, the
Commission said,

"It is ordered, That acquisition . . [be] approved and authorized upon the terms and conditions set forth in the said report of the Commission.

"It is further ordered, That, in Finance Docket No. 18656, the prior orders of the Commission dated March 2, 1955 and May 24, 1955 be vacated to the extent set forth in the said report."

The report in MC-F-10444, at 109 M.C.C. 333, 350, states,

"Still further, in accordance with Alleghany's suggestion, and our own independent evaluation of the situation, we shall require as a condition for the consummation of the proposal that the trusteeship of Alleghany's MoPac Securities, as previously ordered by the Commission, be continued subject to the continuing jurisdiction of the Commission. The Commission in the future may either in response to a petition or on its own motion institute an investigation to determine whether the trust should be continued or whether Alleghany's divestiture of MoPac securities should be required."

9. The fact of the voting trust was fully disclosed to this Court in the reply affidavit of Granville Whittlesey, Jr. made in support of Alleghany's motion to intervene in this action. The affidavit responded to the argument made in the defendants' answering memorandum that Franklin National Bank, the voting trustee of Alleghany's Class B MoPac stock, had to be joined as a party-plaintiff, by stating:

"The facts from which it may be determined whether or not Alleghany's voting trustee is required to be joined as a plaintiff with Alleghany are found in the Voting Trust Agreement between Alleghany Corporation and Franklin National Bank and may be determined by this Court on this motion. Accordingly, I annex hereto as Exhibits 'A' and 'B' respectively the Voting Trust Agreement made as of June 11, 1957 between Alleghany Corporation and Empire Trust Company, and as amended by Agreement dated December 12, 1957 between Alleghany and Empire Trust Company, under which Agreement and amendment thereto Franklin National Bank is and since August 31, 1967 has been acting as Successor Trustee.

"5. Pursuant to the Voting Trust Agreement (Exhibits 'A' and 'B'), Franklin National Bank, as voting trustee, has issued voting trust certificates to Alleghany, which Alleghany holds as evidence of its beneficial ownership of a majority of the outstanding shares of MoPac Class B Stock."

The Whittlesey Affidavit is annexed hereto as Exhibit D
(the Voting Trust Agreements, Whittlesey Affidavit Exhibits A and
B, are not included).

10. In the Reply Memorandum filed in support of Alleghany's motion to intervene as a plaintiff, it was specifically
argued that it was not necessary to join the trustee of Alleghany's
MoPac stock as a necessary party because Alleghany was the real
party in interest.

In the memorandum, it is stated:

"There is no secret about Alleghany's voting trust agreement and the ICC order pursuant to which the trust was established. They are of record for defendants to see, and no issue relevant to this case is presented by them on which discovery is necessary." (Page 9)

The pertinent portions of Alleghany's reply memorandum in support of its motion to intervene are attached hereto as Exhibit E.

11. The status of Alleghany Corporation as a real party in evidence despite the voting trust was conclusively determined by Judge McGohey when he held that the defendants' argument in opposition to Alleghany's motion to intervene were "unpersuasive."

The opinion of the Court is attached hereto as Exhibit

M. Lauch Walter

Sworn to before me this
29th day of November, 1973.

F.

Notary Public

FLORITA H. DAWSON
Notary Public, Stone of Heav York
Ho. Contacts
Outslifed in Knows County
Continued Filed in New York County
Commission Expires March 30, 1975

Exhipt H.

This report will not be printed in full in the permanent series of Interstate Commerce Commission reports.

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 18556

LOUISVILLE & JEFFERSONVILLE BRIDGE AND RAILROAD COMPANY MERGER, ETC.

Decided October 2, 1957

Nomination by Alleghany Corporation of Empire Trust Company of New York City as independent trustee, and the provisions and terms of a voting trust agreement, as modified, between these parties, approved and authorized.

appearances as in previous report.

SUPPLEMENTAL REPORT OF THE COMMISSION

BY THE COMMISSION:

The report of Division 4, in this proceeding, dated March 2. 1955, 290 I.C.C. 725, alluded to cumership by Alleghany Corporation, hereinafter referred to as Alleghany, of securities of the Miscouri Pacific Railroad Company, debtor, in reorganization under section 77 of the Bankruptcy Act, 11 U.S.C. 205, and expressed the view that, if and when Alleghany obtained voting securities of the corporation succeeding such debtor, alleghany would be required to deposit those securities with an independent trustee nominated by it and approved by us. Having under consideration such prior report and also the report in this proceeding dated May 24, 1955, and having knowledge of the fact that Alleghany had obtained voting securities of the reorganized Missouri Pacific Railroad Company, we directed Alleghany by supplemental order herein dated May 14, 1957, forthwith to deposit with an independent trustee nominated by it and approved by us all voting securities obtained by it through the bankruptcy proceeding and any other voting securities held by it of the corporation succeeding the Missouri Pacific Railroad Company, debtor. The successor corporation is the former debtor, " souri Pacific Railroad Company, with appropriate amendments to its articles of incorporation and by-laws.

On July 10, 1957, alleghany filed a petition requesting approval (1) of a voting trust agreement which it had negotiated on

June 11, 1357 with the Empire Trust Company of New York City, and (2) of the nomination of the latter, as trustee. A conformed copy of the voting trust agreement was physically attached to the petition. No representations have been made, or objections presented, by other parties to the proceeding.

Under the agreement Alleghany assigns, transfers and delivers to the Empire Trust Company, hereinafter semetimes referred to as the trustee, all of its voting stocks of the Missouri Pacific Railroad Company, namely 2,200 shares of Class A stock and 19,800 shares of Class B stock; and further agrees to assign, transfer and deliver to the trustee all voting stocks of carriers subject to the Interstate Commerce Act (other than stocks of the New York Central Railroad and its affiliated carriers) which it may acquire. The trustee assumes no obligation to insure compliance by Alleghany with the latter provision.

Section 2 of the agreement provides, among other things, that the trustee shall be entitled independently to vote upon and take any other action in connection with the election of directors which shall be advisable or necessary to further or protect the shares of stock deposited thereunder, and to vote or act upon all matters submitted to stockholders, except that in respect of any matter (other than the election of directors) required by law to be submitted to stockholders, the trustee shall, if so directed, voto or act upon the shares deposited as Alleghany shall in writing direct; that shares represented by certificates pledged by Alleghany shall be voted by the trustee as directed by the pleagee in the event of default, upon being furnished by the pledgee with a certificate of the existence of such default. Section 3 provides in effect that the trustee shall release any shares of stock from the agreement upon surrender of the voting trust certificate dely endorsed, accompanied by a certificate requesting such release and certifying (a) that the shares have been sold to one or more personal not affiliated with Alleghany, an "affiliated person" being dering d

as an officer, director, or employee of Alleghany or any firm or corporation in which Alleghany has an ownership interest directly or indirectly of five percent or more of the voting stock, (b) that ratable distribution of such shares is about to be made by Alleghany to any class or classes of a ockholders, (c) that Alleghany no longer controls another common carrier subject to parts I, II, or III of the act and that a copy of the certificate requesting reliase on such ground has been filed with us, (d) that an order has been issued by us failing or refusing to approve the designation of the trustee or terms and provisions of the agreement, or (e) upon over order approving the release of such shares for any reason whatsoever. It also is provided that if our order shall approve the agreement subject to specified modifications or changes and Alleghany and the trustee agree to incorporate such modifications or changes, the agreement as modified shall remain in full force and effect and no release of shares by the trustee shall be required.

Section 6(b) contains provision that the trustee may cum or hold in trust stock or other securities of carriers whose stock may from time to time be deposited with the trustee by Alleghany to the same extent and in the same manner as though it were not the trustee thereunder.

The trust agreement is to continue for a period of 10 years and is renewable by agreement of Alleghany and the trustee for an additional 10 years unless sooner terminated. Upon any termination the trustee shall release to the record holders of voting trust certificates, or their nominees, the shares of stock held by it under the agreement upon the surrender to it of the voting trust certificates thereof duly endersed.

Other provisions of the agreement are similar to those usually contained in agreements of the same nature dealing with the duties of the trustee, compensation and reimbursement for expenses and liabilities, counsel fees and employment of persons deemed naces sary to discharge the trust, liens upon the corpus of the trust,

the rendition of accounts, and discharge, resignation and removal of the trustee and the appointment of successor trustees, subject to our prior approval.

The voting trust agreement as executed is substantially the same as the agreements between Alleghany and the Chesapeake and Ohio Railway Company on the one hand and the trustee and the Chase National Park of the city of New York on the other, which we approved in Charapaake & O. Rv. Co. Purchase, 261 I.C.C. 239. However, provision is made that the agreement may from time to time be modified or amended in any respect by Alleghany, with our approval, providing that any amendment or modification enlarging the duties or affecting the compensation or lien of the trustee shall be approved by the trustee. Such modification or amendment shall become effective upon our approval.

Alleghany has set forth certain medifications to

the executed agreement which it proposes to make. The
agreement now provides that Alleghany will assign, transfer and
deliver to the trustee all voting stocks of carriers subject to the
act (other than stock of the New York Central Railroad Company and
its affiliated carriers) which it may acquire. To avoid a possible
violation of section 5 of the act, Alleghany proposes to have added
to section 1(b) of the agreement a statement to the effect that it
is further understood that the trustee may refuse to accept the
voting stocks of any carrier when such acceptance would bring the
trustee within section 5(4) of the act which prohibits control of
two or more carriers without our approval.

A further modification is proposed so as to provide that the trustee shall be authorized to vote the stock for all purposes regardless of any suggestion or direction of any other party except where a pleague acquires the right to vote the stock in which case the trustee shall be required to vote in accordance with the directions of the pleague. This modification would result in the deletion from section 2 of the executed trust agreement of

F. D. No. 18656 - Sheet 5

that portion stating that in respect of any matter (other than the election of directors) required by law to be submitted to stock-holders, the trustee, shall, if so directed, vote or act upon the shares deposited as the Alleghamy shall in writing direct.

The agreement would also be modified to redefine the term "affiliated person". In this connection the present definition would be deleted and a new paragraph added to section 3(a) to define the terms used in the agreement as they are defined in part I of the act. This of course would include the definition of affiliate in section 5(6) of the act.

Upon termination of the trust, it is now provided that the trustee shall release to the record holders of voting trust certificates, or their nominees, the shares held by it under the agreement upon the surrender to the trustee of the voting trust certificates thereof duly enforsed. It is proposed that section 5 of the agreement ment be modified to provide that at the termination of the agreement the release of the stock by the trustee shall be subject to our approval.

We are in accord with all of the modifications proposed. However, we believe that the trust agreement should be further modified by excluding affiliated persons as defined in the agreement, should they become pledgees, from having the right to direct the vote of the trustees. This would be in conformity with section 3 prohibiting the sale or release of shares to affiliates. Our approval of the executed agreement and the modifications proposed by Alleghany will be subject to such additional modifications being made to the agreement.

We find that the nomination by Alleghany Corporation of the Empire Trust Company of New York City as independent trustee, and the provisions and terms of the voting trust agreement executed June 11, 1957, by the Alleghany Corporation, on the one hand, and the Empire Trust Company of New York City, as trustee, on the other, as proposed to be modified, subject to the further modification

F. D. No. 18656 - Sheet 6

substantially complies with the provisions set forth in the report of Division 4, dated March 2, 1955, and our supplemental order herein dated May 14, 1957.

'An appropriate order will be entered.

SECOND SUPPLEMENTAL ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 2nd day of October. A. D. 1957.

Finance Docket No. 18656

LOUISVILLE & JEFFERSONVILLE ERIDGE AND RAILROAD COMPANY MERGER, ETC.

It appearing, That the Commission, by division 4, on March 2, 1959, issued its report and order in the above-entitled proceeding, and in said report referred to expersion by Alleghamy Corporation of securities of Missouri Pacific Railroad Commany, debtor, in reorganization under securion 77 of the Bankruptey Act, 11 U.S.C. 205, and stated the view that if and when Alleghamy Corporation obtained voting securities of the corporation succeeding said debtor, said Alleghamy Corporation would be required to deposit those securities with an independent trustee nominated by said Alleghamy Corporation and approved by this Commission;

It further engaging, That, said Alleghamy Corporation having obtained voting securities of the successor corporation, as aforesaid, this Commission by supplemental order dated May 14, 1957, directed said Alleghamy Corporation forthwith to deposit said voting securities and any other voting securities of such successor corporation owned by said Alleghamy Corporation with an independent treates, nominated by said corporation and approved by this Commission as aforesaid;

It further encoring, That on July 10, 1957, said Alleghan's Corporation Files a partition requesting our approval of the provisions and terms of a voting trust agreement executed on June 11, 1957 by the Alleghany Corporation, on the one hand, and the Empire Irust Company of New York City, as trustee, on the other, as proposed to be modified, and the designation of said Empire Trust Company of New York City as voting trustee;

And it further armearing, That this Commission, on the date hereof, naving made and filed a supplemental report, containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof;

It is ordered, That the nomination by said Alleghany Corporation of the Empire Trust Company of New York City as independent trustee, be, and it is hereby, approved and authorized;

It is further ordered, That, the provisions and terms of the voting trust agreement executed on June 11, 1957, by the aforesaid parties, with the further modification indicated in said report, be, and it is hereby, approved and authorized;

It is further ordered. That within 15 days after execution of such ascirica vector; that agreement, a conformed capy thereof shall be filed with this Commission by said Alleghany Corporation;

And it is further entered, That the Alleghany Corporation shall report to tail Commission all pertinent facts concerning

the termination of all or any part of any trust created by said voting trust agreement, indentures, pledges, sale of the stock or otherwise, within 15 days after such termination.

By the Commission.

HAROLD D. McCOY,

(SEAL)

7:

:1:

Secretary.

[CONTORMED]

#14

AGREEMENT made as of this 11th day of June 1957 between Alleguary Corporation, a Maryland corporation, party of the first part (hereinafter referred to as "Depositor") and Empire Trust Company, a New York banking corporation, party of the second part (hereinafter referred to as the "Trustee").

WITNESSETH:

Whereas by its order dated May 14, 1957, in Finance Docket No. 18656 the Interstate Commerce Commission required Depositor in view of its control of the New York Central Railroad Company to deposit all of its voting stock in the Missouri Pacific Railroad Company, with an independent voting trustee under a voting trust agreement; and

Whereas Depositor will submit an application to the Interstate Commerce Commission for approval of the terms and provisions of this Voting Trust Agreement, including the designation of Empire Trust Company as the Trustee hereunder, as complying with the terms of its aforesaid report and order;

Now, THEREFORE, in consideration of the premises and of the agreements hereinafter set forth, the parties hereto agree as follows:

- 1. In compliance with the aforesaid order of the Commission and for the purpose of vesting in the Trustee the right to vote and take other action with respect to such stock for the period and upon the terms and conditions set forth in this Agreement,
 - (a) Depositor hereby assigns, transfers and delivers to the Trustee all of its voting stocks of the Missouri Pacific Railroad Company, namely 2.200 shares of Class A stock and 19,800 shares of Class B stock.
 - (b) Depositor hereby agrees to assign, transfer and deliver to the Trustee all voting stocks of the carriers subject to the Interstate Commerce Act (other than stocks of the New York Central Railroad and its affiliated carriers) which it may acquire. It is understood, however, that the Trustee assumes no obligation to insure compliance by Depositor with this provision.
- 2. The Trustee shall be entitled and it shall be its duty in respect of all of the shares of stock deposited hereunder, either by its duly

authorized officers or by other proxies, with full power of substitution, independently to vote upon and take any other action in connection with the election of directors at meetings of stockholders which shall be advisable or necessary to further or protect the shares of stock deposited hereunder and to vote or act upon all other matters submitted to stockholders, except that in respect of any matter (other than the election of directors) required by law to be submitted to stockholders, the Trustee shall, if so directed, vote or act upon the shares deposited as the Depositor shall in writing direct.

In the event that Depositor shall pledge any voting trust certificates issued hereunder to secure any indebtedness, and the terms of the indenture or agreement of pledge shall contain provisions entitling the pledgee to vote and give consents with respect to the pledged securities if events of stated default shall occur, then, upon the occurrence and during the subsistence of any such event of default, the Trustee hereunder, upon being furnished by the pledgee with a certificate of the existence of such default, on which certificate the Trustee may rely, shall vote the shares of stock represented by such certificates as such pledgee in writing shall direct, whether for the election of directors or upon other matters.

The Trustee shall be entitled to act and rely upon a certificate of Depositor certifying that Depositor has pledged voting trust certificates in the manner and upon the terms hereinabove described and naming the pledgee and specifying the shares held hereunder represented by the pledged voting trust certificates.

- 3. The Trustee shall release any shares of stock from this Agreement and shall transfer, assign and deliver them to the Depositor or upon its order promptly upon surrender of the voting trust certificates in respect of such stock duly endorsed, accompanied by a certificate requesting such release and certifying to one or more of the following:
 - (a) That the shares to be released have been sold to one or more persons not affiliated with Depositor (an "affiliated person" being defined as an officer, director or employee of Depositor or any firm or corporation in which Depositor has any ownership interest directly or indirectly of five percent or more of the voting stock);

- (b) That ratable distribution of such shares is about to be made by the Depositor to any class or classes of its stockholders;
- (c) That Depositor no longer controls another common carrier subject to parts I, II or III of the Interstate Commerce Act and that a copy of such certificate has been filed with the Interstate Commerce Commission;
- (d) That an order has been issued by the Interstate Commerce Commission failing or refusing to approve the designation of the Trustee or the terms and provisions of this Agreement. If the order of the Interstate Commerce Commission shall approve this Agreement subject to specified modifications or changes and the Depositor and Trustee shall agree to incorporate such modification or changes this Agreement as modified shall remain in full force and effect and no release of shares by the Trustee shall be required; or
 - (e) That an order has been issued by the Interstate Commerce Commission approving the release of such shares for any reason whatsoever.
- 4. The Trustee shall be entitled to act and rely upon any notice, consent, request, direction, certificate or other document of Depositor signed by the chairman, president, any vice-president or the secretary thereof; and the Trustee shall be entitled to act and rely upon any such document believed to be genuine and correct and to have been signed by the proper officers.
- 5. This agreement shall continue for a period of ten (10) years and be renewable by agreement of the Depositor and the Trustee for an additional ten (10) years unless sooner terminated as herein provided. Upon any termination, the Trustee shall release to the record holders of voting trust certificates, or their nominees, the shares of stock held by it hereunder upon the surrender to it of the voting trust certificates thereof duly endorsed. Upon the termination of this trust or upon the surrender of voting trust certificates in exchange for the securities represented thereby, or upon any other taxable transfer of stocks held hereunder. Depositor shall furnish to the Trustee funds sufficient to pay any stock transfer taxes which may be payable upon the transfer of the stock respectively deposited by it hereunder.

- 6. The Trustee hereby accepts the trusts and assumes the duties hereby created and imposed upon it, upon the following terms and conditions:
 - (a) The Trustee shall be entitled to reasonable compensation for its services and reimbursement of its expenses and liabilities necessarily and reasonably incurred in connection with its duties under, or actions taken pursuant to, this Agreement, and such compensation and reimbursement shall be paid by the Depositor. Neither the Trustee nor any director, officer or agent thereof shall be liable for any action taken or omitted to be taken by it or them hereunder or in connection herewith, except for its or their own negligence or willful misconduct. The Trustee shall be entitled to rely and act upon opinion of counsel; and the Trustee may employ any persons or corporations deemed necessary by it in the discharge of the duties of this trust and shall not be responsible for the acts of such persons or corporations selected by it in good faith.
 - (b) The Trustee may own or hold in trust stock or other securities of carriers whose stock may from time to time be deposited with the Trustee by the Depositor to the same extent and in the same manner as though it were not the Trustee hereunder. The Trustee shall not be disqualified from acting as registrar, transfer agent, paying agent or in any fiduciary capacity for nor from engaging in customary business and banking activities for, or with, any carriers.
 - (c) The Trustee shall have a lien upon the corpus of the trust estate for reasonable expenses incurred in the administration thereof, counsel fees and compensation for the performance of its duties hereunder, and for reimbursement or indemnification against any liabilities or obligations paid or incurred by it.
 - (d) The Trustee shall annually within sixty days after the close of each calendar year and also within sixty days after its resignation or discharge or the termination of this agreement, or oftener in its discretion, render an account showing all moneys received and disbursed by it during such accounting period, and the Trustee shall not be liable or be compelled to make any prior or other accounting. The Trustee shall promptly thereafter mail to the Depositor a statement of such account. Such accounts as rendered and mailed shall be final and binding and conclusive upon all parties having any interest herein, and the Trustee shall have

no other accountability concerning matters mentioned in said account in so far and as to so much thereof as shall not be specifically contested by the Depositor by notice in writing delivered to the Trustee within thirty days after the mailing of such notice. The Trustee shall keep such accounts on file in its office open to the Depositor's inspection at all reasonable times.

- (e) If the Trustee should wish to resign and discharge itself of the trust hereby created, it shall mail written notice to the Interstate Commerce Commission and to the Depositor. In such event, a successor Trustee shall be appointed in the following manner: Depositor shall by a written instrument delivered to the Interstate Commerce Commission and to the Trustee, appoint as successor Trustee a person, firm or corporation who shall be approved by the Interstate Commerce Commission. Upon such appointment and approval by the Interstate Commerce Commission, such successor trustee shall execute, acknowledge and deliver to the Interstate Commerce Commission, to the resigning Trustee and to the Depositor an instrument accepting such appointment hereunder, and upon transfer of all of the trust estate to the successor trustee without further act or deed the resigning Trustee shall be discharged of its powers and duties (except the duty to account as hereinabove provided) and such successor Trustee shall become vested with all the trust estate and the rights, powers and duties of its predecessor in the trust hereunder. In case of the resignation of any successor trustee, its successor shall be appointed in like manner and shall succeed to the trust estate and the rights, powers and duties of its predecessor under this Agreement. The Trustee may, but shall not have any duty to, vote any shares held by it hereunder after it shall have given such written notice of resignation.
- (f) The Trustee may be removed at any time upon the delivery to the Interstate Commerce Commission and to the Trustee of a written instrument signed by Pepositor and upon the appointment of a successor trustee in the manner provided in sub-paragraph (e) of this paragraph 6. Such removal shall take effect upon the approval by the Interstate Commerce Commission of such removal and of the appointment of a successor trustee and the acceptance by the successor trustee of such appointment, all as provided in sub-paragraph (e).
- 7. This Agreement may from time to time be modified or amended in any respect by Depositor with the approval of the Interstate Com-

merce Commission, provided that any amendment or modification enlarging the duties or affecting the compensation or lien of the Trustee shall be approved by the Trustee. Any such modification or amendment may be manifested by written instrument signed by Depositor and filed with the Trustee, whereupon such modification or amendment shall become effective upon the approval of the Interstate Commerce Commission.

- 8. The Trustee shall issue to the Depositor voting trust certificates representing the stocks deposited by it hereunder. Such voting trust certificates shall be transferable without limitation, except that transfers shall be made only upon the books of the Trustee. The transferee of any such voting trust certificates shall be entitled, upon the surrender thereof to the Trustee and the payment of any applicable taxes or other charges, to receive a new voting trust certificate or certificates for the same number and kind of shares and subject to the same terms and conditions as the surrendered certificates. The registered holder for the time being of any voting trust certificate shall be treated for all purposes as the absolute owner thereof and the Trustee shall not be affected by any notice to the contrary. All dividends (except stock dividends) on any stock deposited hereunder shall upon receipt by the Trustee be promptly distributed to the holders of the voting trust certificates representing stock on which such dividends are paid, of record as of the record date for the payment of the dividend, subject, however, to retention by the Trustee of its compensation, expenses and other charges to the extent provided in paragraph 6(a) of this Agreement.
- 9. In the event that the Depositor shall transfer any such voting trust certificates, the rights powers and privileges conferred upon the Depositor in this Agreement shall, in respect of the shares represented by the voting trust certificates transferred, be vested in and exercisable by the transferee, who shall also become subject to the obligations of the Depositor hereunder in respect of such shares; and all statements and notices provided to be given to the Depositor shall be given to all holders of such voting trust certificates as their addresses appear upon the books of the Trustee.

10. This Agreement shall in all respects be construed according to, administrated under and governed by the laws of the State of New York from time to time in effect.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first above written.

ALLEGHANY CORPORATION

[CORPORATE SEAL]

By DAVID W. WALLACE Vice President

Attest:

JARED C. HORTON
Assistant Secretary

EMPIRE TRUST COMPANY, as Trustee

By F. K. Bosworth
Vice President

[CORPORATE SEAL]

Attest:

H. L. WENDEL . Assistant Secretary

AMENDMENT TO TRUST AGREEMENT

AGREEMENT made as of this 12th day of December, 1957 between Alleghany Corporation, a Maryland corporation, party of the first part (hereinafter referred to as "Depositor") and Empire Trust Company, a New York banking corporation, party of the second part (hereinafter referred to as the "Trustee").

WITNESSETH:

Whereas by its order dated May 14, 1957, in Finance Docket No. 18656 the Interstate Commerce Commission required Depositor in view of its control of the New York Central Railroad Company to deposit all of its voting stock in the Missouri Pacific Railroad Company, with an independent voting trustee under a voting trust agreement; and

Whereas Depositor on July 10, 1957, petitioned the Interstate Commerce Commission for approval of the terms and provisions of a Voting Trust Agreement which it executed with the Empire Trust Company on June 11, 1957, as proposed to be modified, and the designation of Empire Trust Company as Trustee, as complying with the terms of its aforesaid report and order; and

Whereas by its report and order dated October 2, 1957, in Finance Docket No. 18656 the Interstate Commerce Commission approved and authorized the designation of Empire Trust Company as Trustee and the terms and provisions of the Voting Trust Agreement executed on June 11, 1957, as proposed to be modified, with the further modification indicated in its said report dated October 2, 1957;

Now, Therefore, in consideration of the premises and of the agreements hereinafter set forth, the parties hereto agree that the Voting Trust Agreement executed on June 11, 1957, be and it is hereby modified as follows:

1. Section 1 (b) is modified to read:

"(b) Depositor hereby agrees to assign, transfer and deliver to the Trustee all voting stocks of the carriers subject to the Interstate Commerce Act (other than stocks of the New York Central Railroad and its amiliated carriers) which it may acquire. It is understood, however, that the Trustee assumes no obligation to insure compliance by Depositor with this provision. It is further understood that the Trustee may refuse to accept the voting stocks of any carrier when such acceptance would bring the Trustee within Section 5(4) of the Interstate Commerce Act which prohibits control of two or more earriers without the approval of the Interstate Commerce Commission."

2. Section 2 is modified to read:

"2. The Trustee shall be entitled and it shall be its duty in respect of all of the shares of stock deposited hereunder, either by its duly authorized officers or by other proxies, with full power of substitution, independently to vote upon and take any other action in connection with the election of directors at meetings of stockholders which shall be advisable or necessary to further or protect the shares of stock deposited hereunder and to vote or act upon all other matters submitted to stockholders, regardless of any suggestion or direction of any other party except where a pledgee acquires the right to vote the stock in which case the following paragraph shall govern.

In the event that Depositor shall pledge any voting trust certificates issued hereunder to secure any indebtedness, and the terms of the indenture or agreement of pledge shall contain provisions entitling the pledgee to vote and give consents with respect to the pledged securities if events of stated default shall occur, then, upon the occurrence and during the subsistence of any such event of default, the Trustee hereunder, upon being furnished by the pledgee with a certificate of the existence of such default, on which certificate the Trustee may rely, shall vote the shares of stock represented by such certificates as such pledgee in writing shall direct, whether for the election of directors or upon other matters, except that affiliated persons as defined in this Agreement, should they become pledgees, shall not have the right to direct the vote of the Trustee.

The Trustee shall be entitled to act and rely upon a certificate of Depositor certifying that Depositor has pledged voting trust certificates in the manner and upon the terms hereinabove described and naming the pledgee and specifying the shares held hereunder represented by the pledged voting trust certificates."

3. Section 3(a) is modified to read:

"(a) That the shares to be released have been sold to one or more persons not affiliated with Depositor.

The terms used in this Agreement shall be given the definition set forth in Part I of the Interstate Commerce Act;"

4. Section 5 is modified to read:

"5. This agreement shall continue for a period of ten (10) years and be renewable by agreement of the Depositor and the Trustee for an additional ten (10) years unless sooner terminated as herein provided. Upon any termination, the Trustee, with the approval of the Interstate Commerce Commission, shall release to the record holders of voting trust certificates, or their nominees, the shares of stock held by it hereunder upon the surrender to it of the voting trust certificates thereof duly endorsed. Upon the termination of this trust or upon the surrender of voting trust certificates in exchange for the securities represented thereby, or upon any other taxable transfer of stocks held hereunder, Depositor shall furnish to the Trustee funds sufficient to pay any stock transfer taxes which may be payable upon the transfer of the stock respectively deposited by it hereunder."

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first above written.

[CORPORATE SEAL]

ALLEGHANY CORPORATION

By DAVID W. WALLACE

Vice President

Attest:

JOHN F. CONDON

Assistant Secretary

[CORPORATE SEAL]

EMPIRE TRUST COMPANY, as Trustee

By J. R. WILSON

Vice President

Attest:

G. HAGERMAN

Assistant Secretary

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 27th day of January 1970.

No. MC-F-10444

ALLEGHANY CORPORATION—CONTROL AND PURCHASE—
JONES MOTOR CO., INC.—AND CONTROL ERIE TRUCKING
COMPANY

Finance Docket No. 25686

JONES MOTOR CO., INC., STOCK

Finance Docket No. 18656

LOUISVILLE & JEFFERSONVILLE BRIDGE AND RAILROAD COMPANY MERGER, ETC.

No. MC-FC-70907

ALLEGHANY CORPORATION, TRANSFEREE, JONES MOTOR COMPANY, INC., TRANSFEROR

Investigation of the matters and things involved in these proceedings having been made, and said Commission on the date hereof having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered. That acquisition by Alleghany Corporation of the operating rights and property of Jones Motor Company, Inc., and its subsidiary, Erie Trucking Company, merger of Alleghany Trucking Company, a wholly owned subsidiary of Alleghany Corporation, into Jones Motor Company, Inc., and the merger of Jones Motor Company, Inc., into Alleghany Corporation for ownership, management, and operation, and acquisition by Fred M. Kirby and Allan P. Kirby, Jr., individually and as coguardians of the property of Allan P. Kirby, an incompetent, of control of the operating rights and property through the transaction, approved and authorized upon the terms and conditions set forth in the said report of the Commission.

It is further ordered, In Finance Docket No. 25686, that Jones Motor Company, Inc., he, and it is hereby, authorized to 18748 not exceeding 100 shares of its common stock, par value \$1 per share, for the purposes and upon the conditions set forth in the said report.

It is further ordered, That in Finance Docket No. 13656, the prior orders of the Commission dated March 2, 1955, and May 24, 1955, be vacated to the extent set forth in the said report.

It is further ordered, In No. MC-FC-70907, that the application be, and it is hereby, dismissed.

It is further ordered, That if the parties to the transaction herein authorized desire to consummate same, they shall (1) promptly take such steps as will insure compliance with sections 215, 217, and 221(c) of the Interstate Commerce Act, and with the rules, regulations, and requirements prescribed thereunder, and (2) confirm in writing to this Commission immediately after this consummation the date on which consummation has actually taken place.

It is further ordered, That if the authority herein granted is exercised, Allegnany Corporation shall submit for consideration a sworn statement, and one copy thereof, hereby required, which 60 days after the consummation of the transaction, and including expenditures made in connection with the transaction authorized, including the consideration, legal and other fees, commission, and any other costs incidental to the transaction, the assets acquired and liabilities assumed, including loans incurred to consummate the transaction, indicating the account number and title to which each item has been, or is to be, debited or credited.

It is further ordered, That Jones Motor Company, Inc., shall report concerning the matters involved in Finance Docket No. 25686 in conformity with the order of the Commission, division 3, dated May 20, 1904, as amended, respecting applications filed under section 214 of the act (49 CFR 1115.0).

It is further ordered, That except as authorized in Finance Docket No. 25050, the common stock authorized to be issued shall not be sold, pledged, repledged, or otherwise composed of

Exhibit C

ORDER

At a General Session of the INTERSTATE COMMERCE COMMIS-SION, held at its office in Washington, D. C., on the 27th day of January 1970.

No. MC-F-10444

ALLEGHANY CORPORATION—CONTROL AND PURCHASE—
JONES MOTOR CO., INC.—AND CONTROL ERIE TRUCKING
COMPANY

Finance Docket No. 25686

JONES MOTOR CO., INC., STOCK

Finance Docket No. 18656

LOUISVILLE & JEFFERSONVILLE BRIDGE AND RAILROAD COMPANY MERGER, ETC.

No. MC-FC-70907

ALLEGHANY CORPORATION, TRANSFEREE, JONES MOTOR COMPANY, INC., TRANSFEROR

Investigation of the matters and things involved in these proceedings having been made, and said Commission on the date hereof having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That acquisition by Alleghany Corporation of the operating rights and property of Jones Motor Company, Inc., and its subsidiary, Erie Trucking Company, merger of Alleghany Trucking Company, a wholly owned subsidiary of Alleghany Corporation, into Jones Motor Company, Inc., and the merger of Jones Motor Company, Inc., into Alleghany Corporation for ownership, management, and operation, and acquisition by Fred M. Kirby and Allan P. Kirby, Jr., individually and as coguardians of the property of Allan P. Kirby, an incompetent, of control of the operating rights and property through the transaction, approved and authorized upon the terms and conditions set forth in the said report of the Commission.

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EXhibit D.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF WELL YORK

che BETTY LEVIE, on behalf of horself and all other holders of the Class B Limelle Railroad Company, and on behear of said corporation,

Plaintiff,

67 Civ. 5095

AFFIDAVIT

. :

-against-

MISSISSIPPI RIVER CORPORATION, MISSOURI PACKITE FAMILIAND COMPANY, ROBERT H. CRATE, T. C. FRVIS and THOMAS F. HILBANK,

Defendents.

STATE OF HEW YORK : ES.: COUNTY OF HEH YORK

GRANVILLE WHITTLESEY, JR., being duly sworn deposes and says:

- 1. I am a member of the firm of Donovan Leisure Newton & Irving, 2 Wall Street, New York, New York, attorneys for Alleghany Corporation ("Alleghany");
- 2. I make this affidavit in support of Alleghany's motion to intervene as a plaintiff herein and with respect to certain of the contentions made in the answering memorandum served in behalf of the defendants on April 25, 1968;
- 3. Defendants assert at pages 7 and 8 of their memorandum that there is a question whether Alleghany may be made a party-plaintiff horein without Franklin National Pank, the voting trustee of Alleghany's Class B Stock of MoPac being joined as a party-plaintiff. Defendants state that they are not

in a position to do more than raise the question without first conducting discovery against Alleghany.

- which it may be determined whether or not Alleghany's voting trustee is required to be joined as a plaintiff with Alleghany are found in the Voting Trust Agreement between Alleghany Corporation and Pranklin Estimal Bank and may be determined by this Court on this sotion. Accordingly, I annex hereto as Exhibits "A" and "B" respectively the Voting Trust Agreement made as of June 11, 1957 between Alleghany Corporation and Empire Trust Company, and as amended by Agreement dated December 12, 1957 between Alleghany and Empire Trust Company, under thich Agreement and amendment thereto Franklin National Eank is and since August 31, 1957 has been acting as Successor Trustee.
- 5. Pursuant to the Voting Trust Agreement (Exhibits "A" and "B"), Franklin Mational Bank, as voting trustee, has issued voting trust certificates to Alleghany, which Alleghany holds as evidence of its beneficial ownership of a majority of the outstanding shares of MoPac Class B Stock.
- 6. Defendants point out that in a prior action which Alleghany brought against Mississippi, MoPac and directors of MoPac, the predecessor voting trustee, Empire Trust Company, was joined as a party-plaintiff. The action referred to was brought by Alleghany together with its aforesaid predecessor voting trustee to obtain a declaration that MoPac's Class B stock-holders were entitled to vote separately on a proposed consolindation of MoPac with its subsidiary Texas and Pacific Realway Company. MoPac had announced that it intended to submit the plan for approval by its Class A and Class B stockholders voting in the aggregate.

Section 2 of the Voting Trust Agreement as amended provided, and presently provides:

"2. The Trustee shall be entitled and it shall be its duty in respect of all of the shares of stock deposited hereunder . . . to vote upon and take any other action in connection with the election of directors . . . and to vote or act upon all often matters submitted to speciholders, remarkless of any suggestion or director of any party. . . . (Emphasis account)

In the light of the above quoted language there could have been no doubt that Alleghany's voting trustee was a projer if not necessary party to the determination of a question bearing upon the voting rights of Alleghany's MoFac Class B Stock.

- 7. However, the instant case does not involve any issue or question which is or ever could be the subject of stockholder action or vote, and presents no question as to which Alleghany's voting trustee has any responsibility or duty to act under the Voting Trust Agreement.
- 8. I am, in any event, authorized by counsel for Franklin National Bank to advise this Court that Franklin National Bank is prepared to join with Alleghany as a plaintiff intervenor in the event this Court should conclude that Alleghany's intervention should be conditioned upon such joinder.
- 9. Defendants suggest at page 6 of their memorandum that Alleghany as the majority holder of MoPae Class B Steek should not be regarded as an intervening party in this action which was commenced on December 29, 1967, but should be regarded simply as another plaintiff seeking to assert its own claim. They assert that Alleghany does not adopt the allegations of the

Levin complaint but proposes its own complaint (as required by Fed. R. Civ. Proc. 24(c)) with different claims. An examination of the Levin complaint and of Alleghany's proposed intervener's complaint shows that this is not true. Alleghany's complaint asserts that the MoPae directors have arbitrarily and unwarrantedly failed and refused to pay adequate dividends on the Class B Stock, and that their failure to do so has been motivated by a comspiracy between Mississippi, MoPae's majority Class A stockholder, and the directors of MoPae to depress the value of the Class B Stock to the advantage of the Class A Stock. The same claims are alleged in the Levin complaint.

- 10. In connection with their contention that Allegiany should be treated as a plaintiff, rather than a bona fide intervenor, defendants cite Gentry v. Hibernia Benk, 23 F.R. Serv. 23 a.53 (N.D. Calif. 1956). In Gentry, a collusive attempt to confer diversity jurisdiction on the federal court was found in circumstances where diverse and non-diverse plaintiffs, represented by the same attorney, on the same day respectively filed as plaintiffs and as intervenors. There is nothing in the present proceedings, nor do defendants attempt to point to anything, which would even remotely suggest that the prior institution of the Levin action in this Court, followed some months later by Alleghany's instant application to intervene as a plaintiff therein, is the product of collusion between Alleghany and Levin to provide diversity jurisdiction which Allegheny would not have hed if it had brought an independent action in this Court against the same defendants.
- 11. In order to lay to rest the implication of impropriety by Alleghany which defendants raise by innuendo,

there is submitted herewith the affidavit of Sheldon H. Elsen, Esq., counsel for plaintiff Levin, which demonstrates that Mrs. Levin initiated her action without prior consultation of any kind with Alleghany.

Sworn to before me this 29 de dey of April, 1968.

Mat Con S Character Con Control Public

Notary Public, State of New York No. 24-58-501 Qualified in Kings County Cert, filed in New York County Commission Papiers March 33, 1873 E+hibi+ E

· UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

BETTY LEVIN, on behalf of herself and all other holders of the Class B Common Stock of Missouri Pacific Railroad Company, and on behalf of said corporation,

Plaintiff,

-against-

67 Civ. 5095

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROPERT H. CRAFT, T. C. DAVIS and THOMAS F. MILBANK,

Defendants.

REPLY MEMORANDUM IN SUPPORT OF MOTION BY ALLEGHANY CORPORATION TO INTERVENE AS A PLAINTIFF IN THIS ACTION

There is but one question before the Court on this motion: May Alleghany, the owner of more than \$30,000,000 of Missouri Pacific Railroad ("MoFac") Class B Stock, intervene as a plaintiff in an action by another Class B stockholder to compel payment of reasonable dividends and to enjoin continuation by persons controlling MoFac of a conspiracy to compel the Class B stockholders to surrender their shares for less than true value?

"only concluded the rights of the parties. . . In essence, the spurious class action was interpreted as merely a permissive joinder device." <u>Eisen v. Carlisle & Jacquelin</u>, <u>supra</u>, CCH Fed. Sec. L. Rep. ¶ 92,164 at pp. 96,752-3.

One of the fundamental purposes of the amended Rule was to change that result. Now, all categories of class actions are binding on all members of the class:

"All actions will result in judgments binding on the entire group of individuals found by the court to be members of the class. Fcd. Rule C.P. 23(c)(3)." Id. at 96,753.

Nor does Alleghany have any way out of being bound by plaintiff Levin's suit. The "opt out" provision in Rule 23(c)(2) applies only to class actions "maintained under subdivision (b)(3)," and a suit to compel payment of dividends is under subdivision (b)(1)(B) of the new Rule.

See Advisory Committee's Note, 39 F.R.D. 100-101.

Alleghany's citizenship raises no genuine jurisdictional question with respect to its intervention herein. Alleghany has a huge stake in the outcome of this action and should be permitted to participate in the determination of its rights.

C. The Voting Trustee of Alleghany's MoPac Stock Is Not a Necessary Party

Defendants suggest that there is "some question" as to whether Alleghany may be a party plaintiff "without

obtaining the approval of the ICC." (Opposition Memorandum, p. 8). Based on this "question," they want intervention to be conditioned on "priority of discovery against Alleghany."

The foundation for this argument is that Empire Trust Company, former voting trustee for Alleghany's MoPac stock, was a plaintiff with Alleghany in prior litigation against these same defendants wherein the United States Supreme Court unanimously ruled that defendants' proposed consolidation plan, which would have wiped out \$200 million of the McPac Class B equity and largely given it to defendant Mississippi River, was illegal. Levin v. Mississippi River Fuel Corp., and Alleshany Corp. v. Mississippi River Fuel Corp., 386 U. S. 162 (1957).

The prior case involved whether the Class B stock-holders were "entitled to vote separately, as a class, on the proposed plan of consolidation." Ibid. Since voting rights were involved, the voting trustee of Alleghany's MoFac stock joined as a party plaintiff.

The present case, however, has nothing to do with voting rights. Therefore, Franklin National Eank, the current voting trustee, is not a proposed party plaintiff.

^{*} See Alleghany's proposed complaint in intevention, 99 31-35.

As provided by Rule 17(a), Fed. R. Civ. Procedure, every action shall be prosecuted by "the real party in interest." Determination of whether the voting trustee is "the real party in interest" depends on substantive law of New York. See 3A Moore's <u>Federal Practice</u> § 1707. <u>Wells</u>

Farso Frank & Union Trust Co. v. United States, 115 F. Supp.
655 (N.D. Calif. 1953), acrid, 225 F.2d 298 (9th Cir. 1955).

Alleghany, pursuant to its voting trust agreement, holds voting trust certificates, whereas the trustee holds its MoPac Stock. (Whittlesey Reply Affidavit, ¶ 5). The holder of voting trust certificates has the right to sue a foreign corporation in New York courts for dividends on the stock represented by its voting trust certificates. Koppel v. Middle States Petrolcum Corp., 197 Misc. 479, 482, 96 N.Y.S. 2d 38 (Sup. Ct. N.Y.Co. 1950; Breitel, J.), affid without opinion, 282 App. Div. 662, 122 N.Y.S. 2d 802 (1st Dep't 1953).

The voting trust agreement (Exhibits "A" and "B" to Whittlesey Reply Affidavit), which is governed by New York law under Section 10 thereof, provides in pertinent part that "The Trustee shall be entitled . . . independently to vote upon and take any other action in connection with the election of directors . . . and to vote or act upon all other matters submitted to stockholders" (Section 2, as modified).

As to each dividends, the Trustee has no responsibility other than to pass them on to Alleghany (Section 8):

". . . All dividends (except stock dividends) on any stock deposited hereunder shall upon the receipt by the Trustee be promptly distributed to the holders of the voting trust certificates representing stock on which such dividends are paid. . ."

Under Rule 19(a) of the Federal Rules of Civil
Procedure, the Trustee is not a necessary party. "Complete
relief" can be accorded without the Trustee (see Prayer
of Alleghany's proposed complaint). The Trustee is aware
of Alleghany's proposed suit, but does not "claim an
interest" therein. Rule 19(a), Fed. R. Civ. P.

The Trustee's presence not only is unnecessary, but in fact could serve no useful purpose. Alleghany is entitled to the benefits of this suit, and defendants can suffer no prejudice by the Trustee's absence. Cf., Clayton v. James B. Clow & Sons., 154 F.Supp. 108, 121 (N.D. Ill. 1957). Although the Trustee is willing to join if necessary (Whittlesey Reply Affidavit § 8), there is no basis for having it do so.

Moreover, defendants do not ask that intervention be denied on the ground of the Trustee's absence, but rather that they be permitted to have pre-trial priority to inquire into the requirements of the trust. This is a device to try to support an otherwise insupportable across-the-board priority position, which would give defendants a magnificent

opportunity to delay prosecution of this case.*

There is no secret about Alleghany's voting trust agreement and the ICC order pursuant to which the trust was established. They are of record for defendants to see, and no issue relevant to this case is presented by them on which discovery is necessary.

argument that this suit seeks action "closely related to exercise of control" of MoPac (Maney Opposition Affidavit, pp. 5-6). This suit is premised on the facts that defendant Mississippi elects the entire MoPac Board, and that it and the directors it dominates completely control MoPac. At least to the extent of Mississippi's exercised voting power, this is undehiable. It is absurd to even suggest that a holder of shares in a railroad corporation exercises "control" by asking a court to correct unfaithful management. That would mean that any shareholder, such as Mrs. Levin, might "control" two or more carriers, and become subject to ICC regulatory jurisdiction, if she coms stock in another railroad and sues management.

Alleghany's intervention should not be conditioned on making its voting trustee a party plaintiff, nor is there any reason for conditioning intervention on the defendants

^{*} It should be noted that defendants obtained a stay of pretrial discovery by their show cause order of January 31, 1953.

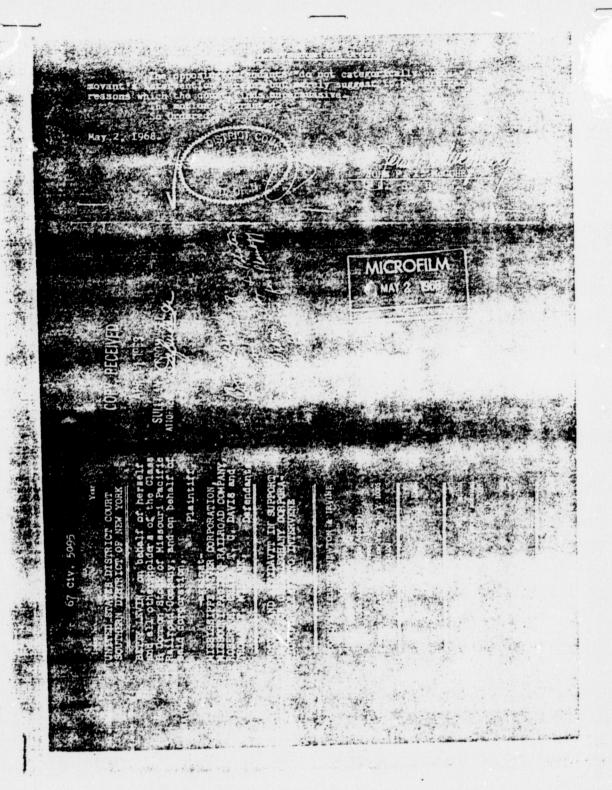
having priority in pre-trial with respect to information they now have which is irrelevant to the action.

D. Defendents Offer No Basis for Priority in Discovery

Defendants suggest no basis for their having priority in pre-trial discovery. At most, they have an argument concerning depositions, because of their prior notices to examine plaintiff leads.

Defendants do not say why priority, even in depositions, is so important to them here. In a shareholders' action of this kind, it is difficult to conceive of valid areas for extended inquiry of the plaintiffs. The defendants exclusively possess most relevant information that is not available from public sources.

Alleghany never has had any intention of wresting deposition priority from defendants by virtue of its intervention. However, in view of the strong indications that defendants may want to stall this case, we urge the Court not to enter an order that may have unintended consequences. Alleghany will submit voluntarily to deposition prior to plaintiff Levin's depositions of defendants, if defendants so desire. But if those depositions are unnecessarily prolonged, we should be free to conduct simultaneous examinations of defendants, as contemplated by the Rules of this Court.



ENDORSED MEMO

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

GETTY LEVIN, ALLEGHANY CORPORATION and ROBERT LEVALUER,

Plaintiffs,

-against-

MISSISSIPPI RIVER CORPORATION MISSISSIPPI RIVER CORPORATION
MISSOURI PACTFIC RAILHOAD COMPANY,
ROBERT H. CRAFT, T. C. DAVIS and
THOMAS F. MILEANK,

Defendants.

67 Civ. 5005 (EW)

HOTICE OF MOTION To set asid judge-nent and order of May 2nd, 1975

Sir:

PLEASE TAKE HOTTON, that the undersigned, app aring for Petitioner Michael Moumousis, will move this honorable Court at the Courthouse, Fole, square, New York, N.Y. in Room 1305 thereof on the 27 day of Hovember 1973 at 2:15 P.M. o'clock or as coon thereafter as counsel may be heard, before the Honorable Ldward Weinfeld, United States District Judge, for an order (a) setting aside the order and final jud ement dated and cat red May and approving the stipulation of settlement of the above captioned case and the recapitalization plan for No 140, and (b) either coinstating the above captioned suit, or dismissing the said suit, or approving the Wisson Plan of Settlement, and () renting such other and further relief as to this fourt we has fact and proper, for the reasons set forth in the ann med petition.

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DATA: Problim New York /5-10 . 1973.

ti loner At orn

Michael Moumousis

office a r.C. account

Brooklan, New York 11012 (212) 309-0009

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That the Alleghary stock was subject to a voting trust was known to the Court. It was specifically referred to in the Court's opinion and also alluded to by counsel representing stockholders at the hearing on the settlement proposal and in briefs and affidavits submitted with respect thereto. In effect, this movant, who did not a pear at the hearing, is seeking a reargument of the issues.

The motion is denied.

Dated: New York, N. Y. December 5, 1973

United States District Judge

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TH CFF COCKET

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

276

BETTY LEVIN, ALLEGHANY CORPORATION and ROBERT LeVASSEUR,

x 67 Civ. 5095 (EN)

Plaintiffs-Respondents

x NOTICE OF APPEAL

-against-

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT, T. C. DAVIS and THOMAS F. MILBANK,

x

x

Defendants-Respondents

MICHAEL MOUMOUSIS,

^

Petitioner.

_ x

SIR:

Please take notice that petitioner, Michael Moumousis, appeals to the United States Court of Rppeals for the Second Circuit the denial by the Hon. Edward Weinfeld, United States Federal District Court Judge for the Southern District of New York of petitioner's motion to set aside the final order and judgment entered in this action and dated May 2, 1973, the said motion having been argued before the said District Court on December 4, 1973, and the denial thereof having been entered on December 7, 1973.

Dated: Brooklyn, New York

January 1, 1974

Yours, etc.

Attorney for petitioner, Michael Moumousis

Office and Post Office Address 617 Third Street
Brooklyn, New York 11215

To:

SHELDON H. ELSEN, LEWIS SHAPIRO,

Of Counsel.

JOHN E. TOBIN, M. LAUCK WALTON, GLENN S. KOPFEL,

Of Counsel.

ABRAHAM L. POMERANTZ, WILLIAM E. HAUDEK,

Of Counsel.

EVERETT I. WILLIS, ROBERT S. WOLF, GERALD E. ROSS,

. Of Counsel.

DAVID W. PECK,
MICHAEL M. MANEY,
CARROLL E. NEESLMANN,
MARCIA B. PAUL,

Of Counsel.

ORANG, ELSEN & POLETEIN
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Betry Levin,
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(212) JU 6-2211

DONOVAN LETSURE MESTON & IRVINE Attorneys for Plaintiff-Appelled Alleghany Corporation, 30 kockefebrer Plaza, New York, New York 19020. (212) 489-4100

POMERANTZ LETT HAUDER & BLOCK
Attorneys for Plaintiff-Appellee
Robert LeVasseur,
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New York, New York 10017.
(212) 532-4800

DEWEY, BALLARTINE, BUSHBY,
PALMER & WOOD
Attorneys for Defendant-Appellee
Mississippi River Corporation,
140 Broadway,
New York, New York 10005.
(212) DI 4-8000

SULLIVAN & CRONWELL
Attorneys for Defendants-Appellees
Missouri Facific Railroad Company,
Robert H. Craft, T. C. Dávis
and Thomas F. Milbank,
48 Wall Street,
New York, New York 10005.
(212) HA 2-8100

Oscilla Survey

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

Betty Levin, Alleghany Corporation : and Robert Levassuer,

Plaintiffs,

-against-

Mississippi River Corporation,
Missouri Pacific Railroad Company,
Robert H. Craft, T.C. Davis and
Thomas F. Milbank,

Defendants.

67 Ctv. 5095 (EW)

NOTICE OF MOTION to modify Judgment and Order of May 2, 1973.

Sir:

PLEASE TAKE NOTICE, that the undersigned, appearing for Petitioner Napoleon C. Gabriel will move this honorable Court at the Courthouse, Foley Square, New York, N. Y. in Rosal 102 thereof on the 12th day of March 1974 at 2:15 P.M. or as soon thereafter as counsel may be heard, before the Honorable Edward Weinfeld, United States District Judge, for an order (a) modifying the Order and final Judgment dated and entered May 2, 1973 approving the Stipulation of Settlement of the above captioned case so that the said Judgment and Order and Settlement Agreement shall not be binding upon Petitioner and all those Class B stockholders who lack the jurisdictional amount, and (b) that Mo Pac's share of the legal fee burden be reduced in proportion to the reduction of the class, and (c) such other and further relief as to this Court seems just and proper, for the reasons set forth in the annexed petition.

Yours very truly,

Gerard H. Carey
Attorney for Petitioner
Hichael Moumousis
Office and P.O. address
617 Third Street,

Brooklyn, New York 11215

Dated: Brooklyn, New York February 22, 1974 To:

ORANS, EISEN & POLSTEIN, ESQS.
One Rockefeller Plaza
New York, New York

POMERANTZ, LEVY, HAUDEK & BLOCK, ESQS.

295 Madison Avenue
New York, New York
Attorneys for Plaintiff, Levin and LeVasseur

DONOVAN, LEISURE, NEWTON & IRVINE, ESQS. 30 Rockefeller Plaza New York, New York 10020 Attorneys for Plaintiff, Alleghany Corporation

Dewey, Ballantine, Bushny, Palmer & Wood, Esos 140 Broadway New York City, New York Attorneys for Defend int, Mississippi River Corp.

SULLIVAN & CROMWELL, ESON
48 Wall Street
New York City, New York
Attorneys for Defendant, Missouri Pacific Railroad Company, Robert H. Craft, T. C. Davis and Thomas F. Milbank

GREENBAUM, WOLFF & ERNNT, ESON
437 Madison Avenue
New York, New York
Attorneys for Class B. Objectors, Edward Garfield and
Barbara M. Garfield

MICHAEL PAUL COHEN, Esq.
7310 N. Oakley
Chicago, Illinois
Attorney for Class A Objectors, Jacob R. Cohen and June
Cohen

Gerard M. Carey Counsel for Petitioner UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF New YORK

BETTY LEVIN, ALLEGRANY CORPORATION X AND ROBERT LEVASSEUR,

Plaintiffs.

x

67 Civ. 5059 (EW)

-against-

MISSISSIPPI RIVER CORPORATION,
MISSOURI PACIFIC RAILROAD COMPANY, X
ROBERT H. CRAFT, T. C. DAVIS AND
THOMAS F. MILBANK,

PETITION

Defendants

Napoleon C. Gabriel, being duly sworn, petitions this court and deposes and states as follows:

- (1) That he resides at R D #2, Rt. 33, Freehold, New Jersey 07728, and is an owner of only five certificates of Class B stock of the Missouri Pacific Railroad Company (Mo Pac).
- (2) That this honorable court, in its order and final judgment dated and entered May 2, 1973, retained "jurisdiction of all matters respecting the consummation of the settlement of this action pursuant to the Stipulation of Settlement and for the purposes of entertaining applications for attorneys' fees and expenses by counsel for plaintiffs Betty Levin and Robert Le Vasseur and by plaintiff Allegheny Corporation".

RELIEF SOUGHT

(3) Petitioner, in light of ZAHN v. INTERNATIONAL PAPER COMPANY, U.S. Sup. Ct. decided December 17, 1973, claims that this court had no jurisdiction over him, or those similarly situated because petitioner and approximately 76.1% of the

Class B stockholders as of May 1, 1973, lacked the jurisdictional amount necessary for this court to make a judgment binding them as a class.

Wherefore, petitioner respectfully requests this court to so amend its final judgment of May 2, 1973, approving the settlement agreement in this action, dated December 18, 1972, so as to make it clear that neither the judgment or the settlement agreement are binding on petitioner and those similarly lacking the jurisdictional amount (Title 28 USC 1332); and further that with the reduction of the class that the fees of counsel to be paid by Mo Pac be substantially reduced in proportion to the reduction of the class represented.

Dated: February 15, 1974 Respectfully submitted,

Napoleon C. Gabriel

Napoleon C. Gabriel

I, the undersigned attorney, duly admitted to practice in the United States District Court, Southern District of New York, that on February 15, 1974, at Newark, New Jersey, Napoleon C. Gabriel affixed his above signature before me.

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

x

BETTY LEVIN, ALLEGHANY CORPORATIONX AND ROBERT LEVASSEUR,

Plaintiffs, x

67 Civ. 5059 (DW)

-against-

SUPPLEMENTAL

MISSISSIPPI RIVER CORPORATION
MISSOURI PACIFIC PAILMOND COMPANY
ROBERT M. CRAFT, T.C.DAVIS AND
THOMAS F. MILBANK,

PETITION

Defendants x

Napoleon C. Gabriel, being duly sworn, deposes and says:

- (1) That he adds the following grounds to his motion dated Pebruary 15, 1974 as added grounds that the relief that he and other class B stockholders of Mo Pac similarly situated be relieved from the judgment of this Court dated May 2, 1973.
- (2) That said added grounds are as follows:
 (a) That this honorable court lacked adjudicatory power to approve the stipulation of settlement of the above captioned action on the grounds that:
 - 1. The settlement being so foreign and alien to the cause of action presented in the pleadings it was violative of Rule 23 of the Federal Rules of Civil Procedure;
 - 11. Alleghany's certificates of Class B stock being in trust under the continuing jurisdiction of the Interstate Commerce Commission, Alleghany was not a real party

in interest for the settlement of the said suit and was not representative of the Class purported to be represented; and III the judgment was violative of the petitioners rights to due process of law.

Dated: March 18, 1974

Napoleon C. Gabriel

State of New Jersey County of Monmouth

On this 20th day of March, 1974, Napoleon C. Gabriel known to me appeared before me and affixed his signature to above after having been duly sworn.

IRENE MATULIS
NOTARY PUBLIC OF NOW JERSEY
My Commission Expires Nov. 23, 1975

ORANS, EISTM & POLSTEIN, ESQS. One Rockef Aler Phara New York, New York

Pomerantz, Llvy, Haubek & Block, Esqs., 295 Madison Avenue New York, New York Attorneys for Plaintiff, Levin and LeVasseur

Donovan, Leisure, Newton & Invine, Esos. 30 Rockeldier Plaza New York, New York 10020 Attorneys for Plaintiff, Aliegheny Cooperation

DEWEY, BALLANTINE, BUSHRY, PALMER & WOOD, Esos. 140 Broadway New York City, New York Attorneys for Defendant, Mississippi River Corp.

SULLIVAN & CROMWELL, ESQS.
48 Wall Street
New York City, New York
Atteneys for Defendant, Missouri Pacific Railroad Company, Robert B. Craft, T. C. Davis and Thomas F. Milbank

GREENBAUM, WOLFF & ERNST, Esqs.
437 Madison Avenue
New York, New York
Attorneys for Class B, Objectors, Edward Garfield and
Barbara M. Garfield

MICHAEL PAUL COHEN, Esq.
7310 N. Oakley
Chicago, Illinois
Attorney for Class A Objectors, Jacob R. Cohen and June
Cohen

Gerard M. Carey Coursel for Petitioner

ENTEREL UNITED STATES DISTRICT COURT Franceryst of proceedings 2 SOUTHERN DISTRICT OF NEW YORK 3 4 BETTY LEVIN, et al., 5 Plaintiffs, : 6 vs. : 67 Civ. 5905 7 MISSISSIPPI RIVER CORP., et al., 8 Defendants. : 9 10 Before: 11 HOM. EDWARD WEINFELD, 12 District Judge. 13 14 New York, March 26, 1974, 15 2:15 p.m. 16 17 APPEARANCES: 18 ABRAHAM POMERANTZ, ESO., WILLIAM HAUDEK, ESO., 19 SHELDON ELSEN, ESQ., Attorneys for plaintiffs 20 DONOVAN LEISURE NEWTON & IRVINE, ESOS., 21 Attorneys for Alleghany Corp., M. Lauck Walton, Esq., of Counsel 22 SULLIVAN & CROMVELL, ESOS.,

Railroad;

Michael Maney, Msg., of Counsel

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Attorneys for Missouri Pacific

I am appearing here today for Napoleon C. Gabriel, the

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owner of five shares of class B stock of Missouri Pacific

My name, your Monor, is Gerard M. Carey, and

others.

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Railroad, and we have made a motion requesting a modifi-2 cation of your judgment and order of May 2, 1973 at which 3 time this honorable court approved a stipulation of settlement of a class action the title of which is Betty Levin, et al. against Mississippi River Corp. and 6

> The basis of our request in this motion, your Honor, the relief sought is a modification of the judgment to allow Mr. Gabriel, Mapoleon Gabriel, who is an owner of only five shares of class B stock, out from under the binding effects of the judgment on the basis of a recent Supreme Court decision known as Zaon against International Paper Company, which was decided December 17, 1973, and dealt with some basic principles of class actions, of which the instant case was a class action, and undoubtedly, at least until the judgment is final, is a class action.

I know your Honor is very familiar with this case, it's been long and protracted, and I will be brief.

The gist of the Sahn case was a situation where four owners, lake shore owners, started an action against International Paper and based their jurisdiction on diversity of citizenship, accusing International Paper

of polluting the waters in the lake.

amount of \$10,000, and they attempted to represent 200 other lake shore owners and to have a class action.

The district court denied their efforts to be class representatives. This was affirmed in the Second Circuit, and finally in the Supreme Court in December of '73. It was determined that in these spurious suits each and every plaintiff must have the jurisdictional amount of \$10,000.

There was a dissent in the Zahn opinion to the effect that previously, as long as somebody had the jurisdictional amount and met all the other requirements, was properly representative of the others to be represented, that the court could take ancillary jurisdiction.

To relate briefly the Zahn opinion as I see it affecting this case --

THE COURT: Is this a spurious class action?

MR. CAREY: I would say it is, your Honor, in so for -- in a very similar way that we had stockholders three of them, suing for better dividends, and then they claimed to represent other stockholders, and it appears

from the records of the corporation that 76.1 per cent of the class B stockholders, of the class B stockholders, owned 10 shares or less, and in no reasonable sense did they have in litigation in this class suit \$10,000.

In light of Zahn, in which in effect the lake was polluted or alleged to have been polluted, it affected everyone, the Supreme Court came up with the determination that each and every one hereafter in spurious class suits must have the \$10,000 jurisdictional amount.

Now, I submit --

THE COURT: Wasn't there also a cause of action in this case based on the Securities Exchange
Act?

MR. CAREY: There was in one of the plaintiffs but as a group, the basic decision was on the ground of suing for dividends.

THE COURT: One of the affidavits in opposition to your motion states that you applied for reargument to the Supreme Court and predicated your claim for reargument on the Zahn case. Is that correct?

MR. CAREY: That is correct, your Honor, but as we know, there was quite a delay. I was quite

hopeful that we would get the interest of the court to resolve this rather confused situation with respect to Rule 23, and as we know, we can't --

MR. CAREY: Well, to me, your Honor, in a sense it is confused, in that if the three owners in this case or the four owners in the Zahn case all of a sudden decided to settle the case presuming that they were permitted to be representative, and settled that case by selling out all the people that own the land, or by making the mortgagees of properties owners of land as a settlement, then I would certainly see the similarity and the confused situation.

people start suing for one thing and they end up by giving the Class A some of the equity of class B.

of it. Notice went out to all the shareholders, did it not, in this case?

MR. CAREY: Your Honor, you are correct.

That was in reply why I think the interpretations as to

Rule 23 are confusing, because if -- and I don't want to

bore the court or impose on the court but for the moment,

your Honor, just conjure up, if the Zahn case had gone

the other way, and if these four owners were the representatives of all the others, and then decided to settle with Interantional Paper by making the mortgagees who only held liens for the others that were represented, making them equal owners with the others, we would have a very similar case to what we have here, and that is what the unhappiness is about.

The Zahn case clearly shows that you can't have a class action unless everybody has 10,000 when you are dealing with separate and not a joint cause of action.

When our people were notified that Mrs.

Levin and Alleghany and the others were suing for better dividends, the normal reaction is, "Wonderful, if we win we are better off. If they lose we are not hurt," but they never once thought they would have come out with a situation where they can't even get en evaluation.

Your Monor was very fair and clear in vour opinion that the amount was not an evaluation of the value of the stock, it was an evaluation for settlement purposes, and this was proper.

But Missouri law does not even give these people that are unhappy an opportunity to have a day in court to have an evaluation, and this is a very serious situation.

The only other thing I can say in conclusion, which is a brief thing relative to the fees, obviously having come into this case --

THE COURT: Why don't vou wait until I hear the fee applications. I will hear you then.

MR. CAREY: All right, your Honor. The only -- all right.

THE COURT: I think I ought to hear the movants first on the fee application and then I will hear you. Who is in opposition to this motion made by Ur. Carey?

MR. HAUDEK: Nav it please the court,
my name is William Haudek. My firm are the attorneys
for the plaintiffs LaVasseur, and we have submitted a brief
in opposition to this motion on behalf also of plaintiff
Levin.

As your Honor has pointed out, there are two reasons why the jurisdictional objections of the applicant are unfounded. In the first place, this is not a spurious action class suit such as was involved in the Zahn case. In this case there has been a determination that the class suit is one under Rule 23(b)(1), not under Rule 23(b)(3). A class suit under (b)(1) is the analogue to what previously was what is known as a

true or genuine class action, and it is thoroughly settled and undisputed by the Zahn case that in a true class action the interests of the class members can be aggregated.

Specifically with respect to actions to compell the declarations of dividend, we are also citing authorities to the effect that those are actions that involve a common right of all the shareholders of the corporation. Obviously, the corporation could not declare a dividend on behalf of some stockholders and not on behalf of others. This is one reason why the Zahn case is inapplicable. The other reason is that in this action the plaintiffs have also alleged a claim under the Securities Exchange Act and rule 10b-5, and that claim of course does not require any jurisdictional amount so far as common law claims are concerned. They are obviously pendant to the 10b-5 claim, and therefore again the jurisdictional amount is not required.

Four days ago we have been served with a supplemental petition, but since my adversary has not argued it, I think I may skip it.

on the supplemental petition.

MR. HAUDEK: Four days ago, your Honor, we

were served with a supplemental petition by Mr. Gabriel dated March 18, 1974.

THE COURT: Is that one that the court lacked judicatory power?

MR. HAUDEK: That's right.

MR. CAREY: Yes, your Honor, I know that argument has been made before, but as a natter of record -THE COURT: That has all been presented previously.

MR. CAREY: Before.

MR. HAUDEK: All the three points mentioned in the supplemental petition have been previously disposed of.

MR. CAREY: The only thing, your Honor, if
I may in response that this is a spurious class suit,
as far as the dividends are concerned, there is no doubt
in my mind the cases cited by my honorable opponent
I have checked were prior to 1966 with the change of the
rule for one thing.

In addition, suppose in Zahn the four people ask for an injunction against the International Paper, what would happen to the lake then? I mean you either have one lake, one body of water unpolluted or not. I understand that you can't declare dividends for one

stockholder and not another, but the causes of action that were alleged as to defendants were certainly distinct and separate while they centered on a common question.

THE COURT: Does that dispose of this matter, that motion?

MR. MANEY: My name is Nichael Maney, representing defendant Missouri Pacific Railroad. Mr. Haudek was authorized to speak on behalf of the defendants on this motion as well.

MR. WALTON: Your Honor, my name is M. Lauck Walton of Donovan Leisure Newton & Irvine. We represent Alleghany Corporation, Mr. Haudek was also authorized to speak for us with regard to that portion of the motion.

MR. CAREY: May I at this point, unless there is anything further on this motion, save my client the expense as far as the motion is concerned.

THE COURT: That ends this portion.

This motion is without marit. The holding and rather of Eahn v. International Paper Co., 42 U.S.L.W. 4037 (5.3., 5 17, 1973), is applicable to class actions under Fed. R. Civ. 1. 23(b)(3); as plaintiffs correctly point out, this suit was certified as a class action under Fed. R. Civ. P. 23(b)(1) and (2). Further, jurisdiction for this action was grounded on section 27 of the Securities Exchange Act of 1934, 15 U.S.C., section 78aa (1970), and pendent jurisdiction. See Levin v. Mississippi, 59 F.R.D. 353, 359-60 (S.D.N.Y. 1973). Section 27 does not require a minimum amount in controversy, and Zahn is not applicable to suits brought thereunder. See Zahn v. International Paper Co., 42 U.S.L.W. 4087, 4091 n. 11 (U.S., Dec. 17, 1973). Finally, after the Supreme Court had denied certiorari in the instant case, the petitioner applied for a rehearing based on the Zahn case, and the petiticn was denied.

Dated: New York, N. Y. April 8, 1974 United States District Judys



UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

Betty. Levin, Alleghany Corporation : and Robert Levassuer

67 Civ. 5095 (EW)

Plaintiffs,

-against-

NOTICE OF APPEAL

Missischopi River Corporation, :

NTE Robert H. Craft, T.C. Davis and :

N OFFICE DOGMAS F. Milbank,

Defendants

PLEASE TAKE NOTICE that Tapoleon C. Gabriel appeals Postmarketo the United States Court of Appeals, Second Circuit, the final order of the Federal District Court Southern District of New York dated April 8, 1974, and subsequently docketed and entered, which denied appellants motion to amend its judgment in the above captioned action so as to make said judgement not binding

on appellant and others similarly situated.

Dated: Brooklyn, N. Y. May 11, 1974

Attorney for Petitioner 617 Third Street

Brooklyn, New York 11215

To:

Orans, Eisen & Polstein, Esqs. One Rockefeller Plaza New York, New York

Pomerantz, Levy, Haudek & Block, Esqs. 295 Madison Avenue New York, New York Attorneys for Plaintiff, Levin and LeVasseur

Donovan, Leisure, Newton & Irvine, Esqs. 30 Rockefeller Plaza New York, New York 10020 Attomneys for Plaintiff, Alleghany Corporation

Dewey, Ballantine, Bushy, Palmer & Wood, Esqs. 140 Broadway New York, New York Attorneys for Defendant, Mississippi River Corp.

Sullivan & Cromwell, Esqs.
48 Wall Street
New York, New York
Attorneys for Defendant, Missouri Pacific Railroad
Company; Robert H.Craft, T.C.Davis and Thomas F.
Milbank

Greenbaum, Wolff & Ernst, Esqs.
437 Madison Avenue
New York, New York
Attorneys for Class B, Objectors, Edward Garfield and
Barbara M. Garfield

Michael Paul Cohen, Esq.
7310 N.Oakley
Chicago, Illinois
Attorney for Class A Objectors, Jacob R. Cohen and
June Cohen

Jeneth Line

Jeneth Line

Gerard M. Carey Counsel for Petitioner UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

BETTY LEVIN, ALLEGHANY CORPORATION and ROBERT LeVASSEUR,

Plaintiff,

67 Civ. 5095 (EW)

: EXPENSES

- against -

NOTICE OF APPLICATION

OF ALLEGHANY CORPORATION
FOR COUNSEL FEES AND

MISSISSIPPI RIVER CORPORATION,
MISSOURI PACIFIC RAILROAD COMPANY,
ROBERT H. KRAFT, T. C. DAVIS and
THOMAS F. MILBANK,

Defendants.

SIRS:

PLEASE TAKE NOTICE that upon the Affidavit of John E.

Tobin (with Exhibit A appended thereto) submitted herewith, the

Affidavit of Jared C. Horton submitted herewith, the Memorandum

In Support of the Application of Alleghany Corporation for

Fees and Expenses submitted herewith, upon all prior proceedings

heretofore had herein, and pursuant to section 7.10 of the

Agreement of Settlement of the above-captioned action dated

December 18, 1972 and approved by the Order and Final Judgment

of the Honorable Edward T. Weinfeld, District Judge, dated

May 2, 1973, Plaintiff Alleghany Corporation will apply to this

Court, in Room 102 of the United States Court House, Foley Square,

New York, New York 19007, on March 26, 1974 at 2:15 P.M., or as

soon thereafter as counsel can be heard, for allowance and award

to Alleghany Corporation of counsel fees and expenses incurred

in the prosecution and settlement of the above-captioned action.

Dated: New York, New York March 12, 1974

Yours, etc.

DONOVAN LEISURE NEWTON & IRVINE

By James & Daniel
A Member of the Firm

Attorneys for Plaintiff Alleghany Corporation 30 Rockefeller Plaza New York, New York 10020

TO: SULLIVAN & CROMWELL
Attorneys for Defendancs
Missouri Pacific Railroad Company,
Craft, Davis and Milbank
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DEWEY, BALLANTINE, BUSHBY,
PALMER & WOOD
Attorneys for Defendant
Mississippi River Corporation
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MR. LEON SCHREIBER 12 North Seventh St. Allentown, Pennsylvania 18101

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MR. JAMES C. GABRIEL
R.D. #1, Box 16
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MR. WILLIAM R. WESSON 1550 Ocean Avenue Mantoloking, New Jersey 08738

MR. WINCHESTER F. INGERSOLL, JR. 381 Broadway Cambridge, Massachusetts 02139

MR. JOSEPH SAMONE P.O. Box 58 Bradley Beach, New Jersey

DILLON & O'BRIEN 535 Fifth Avenue New York, New York 10017

MR. JOHN CHARLES VAIANI 1313 River Avenue Point Pleasant, New Jersey 08742

MR. ROBERT W. MARTZ, JR. 24 Morningside Drive Toms River, New Jersey 08753

MR. MURRAY YELLEN 2300 Olinville Avenue Bronx, New York 10467 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

BETTY LEVIN, ALLEGHANY CORPORATION, : and ROBERT LeVASSEUR,

Plaintiffs,

- against - 67 Civ. 5095 (E.W.)

:

MISSISSIPPI RIVER CORPORATION,
MISSOURI PACIFIC RAILROAD COMPANY,
ROBERT H. CRAFT, T. C. DAVIS and
THOMAS MILBANK,

AFFIDAVIT OF JOHN E. TOBIN

Defendants.

STATE OF NEW YORK)

COUNTY OF NEW YORK)

JOHN E. TOBIN, being duly sworn, deposes and says:

I am a member of the firm of Donovan Leisure Newton

E Irvine ("DLN&I"), counsel for plaintiff Alleghany Corporation
("Alleghany") in this action, and I am fully familiar with all
proceedings had herein. I make this affidavit in support of
Alleghany's application for allowance and award to it of
attorney's fees and expenses incurred in the prosecution and
settlement of this action.

The Court is already familiar with the nature of this litigation and with the difficult legal and factual issues which it raises. Set forth herein is a review of the nature of the professional services rendered, and of the expenses incurred, by DLN&I on behalf of Alleghany in the prosecution and settlement of this action, as well as the amounts in which DLN&I has been compensated for such services, and reimbursed for such expenses, by Alleghany. Also set forth herein is a summary of the services

performed by experts and other law firms retained by Alleghany to assist my firm in the conduct of this action, and the amounts paid by Alleghany for such services.

It is my understanding that counsel for defendants have stated that they will not oppose an application by Alleghany for fees and expenses in the amount of \$850,000.

I. SUMMARY OF PROFESSIONAL SERVICES RENDERED BY COUNSEL FOR ALLEGHANY IN THIS ACTION AND THE SETTLEMENT THEREOF

Prosecution of the Class Action

This litigation was initiated in the Southern District of New York on December 29, 1967 by the service of the summons and complaint of Betty Levin. 67 Civ. 5095. On January 19, 1968, Robert LeVasseur commenced a similar action in the Eastern District of Missouri. Civ. No. 68 C 29(3). The complaints alleged similar causes of action to compel dividends, and both purported to be class actions. On January 31, 1968, defendant Missouri Pacific Railroad Company ("MoPac"), whose headquarters are located in St. Louis, moved to transfer the Levin action from the Southern District of New York to the Eastern District of Missouri, or to dismiss Levin on grounds of forum non conveniens, or to stay the action under Rules 23 and 23.1 of the Federal Rules of Civil Procedure. Alleghany moved to intervene in the Levin suit on April 11, 1968 and, four days later, filed papers in opposition to defendant's motion to transfer, dismiss or stay that suit.

MoPac disputed Alleghany's right to submit these papers arguing that Alleghany was not, and might never become, a party. Defendants also attempted to delay Alleghany's intervention in the Levin suit at least until Judge Herlands had decided defendants' motion to transfer, dismiss or stay that suit. Alleghany success-

fully fought this attempt, and was granted leave to intervene on May 2, 1968.

On June 12, 1968, defendants, in pursuit of their determination to fight the dividends action in their home state of Missouri, moved to declare the LeVasseur suit maintainable as a class action. During the pendancy of that motion in St. Louis, plaintiffs diligently prosecuted the Levin suit in New York.

On July 31, 1968, Judge Herlands, in a twenty-four page opinion, denied defendants' motion to transfer, dismiss or stay the Levin action and, on September 30, granted LeVasseur leave to intervene therein. On October 9, 1968, Judge Bryan ordered that the Levin action be maintained as a class action.

On October 31, 1968, LeVasseur moved for leave to dismiss his action in the Eastern District of Missouri without prejudice. Although not a party of record to the St. Louis action, Alleghany actively supported LeVasseur's motion to dismiss his suit through the submission of an affidavit of Clifford Ramsdall, Alleghany's then Vice President - Corporate Relations, and through participation by counsel in pre-trial conferences held at St. Louis. On December 31, 1968, the federal district court for the Eastern District of Missouri granted LeVasseur leave to dismiss his action without prejudice, according substantial weight to Alleghany's great financial stake in the class action and to its preference to litigate that action in New York. Alleghany's intervention in the Levin suit, and its successful efforts to resist defendants' attempts to shift the forum of the dividends suit to St. Louis, entailed the expenditure of many hours of professional time.

While Alleghany's counsel was engaged in litigating these preliminary procedural matters, it also commenced preparing the merits of this case for trial. During this period, DLN&I undertook extensive legal research into the difficult area of

judicial authority to compel the declaration of dividends. The first of many legal memoranda dealing extensively with discovery issues (e.g., the applicability of the attorney-client privilege and work-product immunity to documents sought to be discovered by parties on both sides) was drafted in May of 1968. Research relative to several of the defenses asserted by defendants, such as the statute of limitations and the avoidance of judicial interference in the internal affairs of a foreign corporation, was also initiated at this early stage.

When the prospect of settlement dimmed late in the Spring of 1971, DLN&I undertook to amend Alleghany's Complaint in order to assert a claim for damages and an injunction under section 10(b) of the Securities Exchange Act of 1934. Research into the difficult question of plaintiffs' standing to sue for damages thereunder received particular emphasis.

Subsequently, as the date of trial drew near,
Alleghany's counsel researched evidentiary questions which include the admissibility of certain types of evidence, and the
advisability and use of witness depositions at trial.

Preparation of the case on behalf of the plaintiff class required legal and factual research into a variety of other areas far too numerous to mention in detail. These include the complex history of MoPac's reorganization, including analyses of the series of seven ICC opinions relating to the several proposed plans, the Voting Rights litigation, applicable statutes and regulations, relevant accounting principles, and analyses by my firm's attorney of an immense volume of corporate financial data of defendants and of other railroads, as well as the evaluation of the work product of financial experts and accountants retained by Alleghany.

The majority of DLN&I's time devoted to the prosecution of this action, however, was spent in activities related to the far-reaching and lengthy discovery which was directed by my firm. The details of these activities are fully set forth in the Affidavit of M. Lauck Walton, Supporting Settlement, appended hereto as Exhibit A. This work includes the preparation of thorough interrogatories, and of the responses to defendants' interrogatories, preparation for the depositions of defendants and witnesses, and the taking of these depositions in cooperation with counsel for plaintiff Levin, the extensive investigation of the files of MoPac at St. Louis over a period of several months during the Summer of 1970, the evaluation, re-evaluation, and organization by my firm's attorneys and experts of the fruits of that investigation as well as of all relevant material found in Alleghany's files. The discovery of MoPac's files unearthed invaluable documentary support for plaintiffs' contentions including the allegations of a conspiracy by defendants to withhold dividends in order to depress the price of MoPac Class B Stock.

DLN&I continued its litigation activity through the Fall of 1972 as the negotiations, which culminated in the present Settlement Agreement, progressed.

Settlement of the Class Action.

A substantial amount of DLN&I's legal time was also devoted to forging the settlement of this litigation. I participated extensively in those negotiations, the details of which are set forth in the Affidavit of M. Lauck Walton, Supporting Settlement, pp. 14-17. Throughout this period, DLN&I engaged in numerous negotiating sessions with counsel and other representatives of the parties, analyzed and evaluated in detail a

considerable variety of alternative settlement proposals and researched or had researched the effects of various laws, which include the Interstate Commerce Act, the Securities Exchange Act of 1934, the federal tax laws and corresponding regulations, on the settlement proposals.

Since the execution of the Settlement Agreement on
December 18, 1972, Alleghany's counsel has expended substantial
time in carrying out the terms of that Agreement. Preparation
for the hearing for the approval of the settlement, held before
Judge Weinfeld on January 25, 1973, included the drafting by
DLN&I of affidavits and a memorandum of law on behalf of Alleghany
in support of the settlement, and a joint memorandum on behalf of
all parties in reply to objections to the proposed settlement.
My firm also participated, along with counsel for the other
parties, in opposing objectant William R. Wesson's continued
challenges to the settlement both in this Court and before the
Court of Appeals for the Second Circuit.

Following the execution of the Settlement Agreement, my firm reviewed proxy material relating to MoPac's stockholders meeting for the purpose of approving the settlement.

DLN&I also participated so stantially in the hearings before the Interstate Commerce Commission held during the week of September 17, 1973, relating to MoPac's request for authority under section 20(a) of the Interstate Commerce Act to issue the new shares of stock called for by the Settlement Agreement.

This participation included the submission of a brief in support of the application and virtually the entire cross-examination of objectant witnesses. My firm also prepared the response to the motion of Michael Moumousis to set aside the judgment of this Court approving the Settlement Agreement, which motion was denied

December 5, 1973, and joined in the Brief in Opposition to William Wesson's petition to the Supreme Court for a writ of certiorari, which was also denied.

Pursuant to Section 5.1(c)(i) and (ii) of the Settlement Agreement, respectively, DLN&I has also prepared various opinion letters to Alleghany, met and corresponded with S.E.C. personnel, and engaged in a variety of other activities to effectuate the terms of the Settlement Agreement relating to the tender of Alleghany's MoPac Class B stock to Mississippi River Corporation ("MRC").

above, were essential to the effective prosecution and settlement of this action. As a result of these efforts, plaintiffs were fully prepared to bring this case to trial by the scheduled date of December 1, 1972. It is my belief that the case against defendants which had been assembled by that date, under my firm's direction, and which was based largely upon the discover direction, and which was based largely upon the discovery and organization by my firm, and by experts employed to assist us, of documents discovered from defendants' file and of financial data was an important factor in achieving the present terms of settlement which secure for the plaintiff class a package of cash and securities valued at approximately \$98,000,000.

Finally, DLN&I rendered further legal services in preparation for, and participation in, the Closing in St. Louis, Mo. required under § 6 of the Settlement Agreement.

II. DLN&I Attorney's Time Billed to Alleghany For Professional Services Rendered

During the period of time from March 1968 through January 21, 1974, the late of Closing pursuant to the Settlement Agreement, attorneys of my firm have expended a total of approximately

14,312-1/2 hours in the prosecution of this action. The total fee paid or payable by Alleghany in consideration of those services is \$680,234.68.

These figures are derived from records maintained by my firm in the normal course of its business, including the diaries of the attorneys who have been engaged in work on this action.

The rates at which DLN&I has billed Alleghany for attorneys' time have varied from time to time. It is my belief that these rates have been, and that the present rates are, reasonable and commensurate with rates customarily charged by our firm and by other firms of similar repute which offer substantially similar skills and services.

III. Expenses Incurred by DLN&I

My firm has incurred reasonable and necessary expenses in connection with this litigation, and the settlement thereof, which total \$59,712.20 for the period March, 1968 through January 21, 1974. The disbursements are allocable to sundry necessities which include stenographic charges, travel, meals, telephone and telegraph services, postage, transportation, messenger and reproduction services, various types of overtime expenses, and assorted fees and certifications.

I have derived the figures for expenses incurred from records maintained by DLN&I in the ordinary course of business.

These records are based upon bills sent to, and payments received from, Alleghany.

The grand total billed to Alleghany for attorneys' fees and expenses amounts to \$739,946.88. As of this date, \$676,338.90 has been paid, and Alleghany has agreed to pay the remainder.

IV. Other Services Paid for Directly by Alleghany

To assist DLN&I in the prosecution and settlement of this action, Alleghany has retained the services of the law firms of Fordyce, Mayne, Hartman, Reynard & Stribling and Holland & Hart, of Eric J. Klinger, a certified public accountant, and of Transportation Research and Temple, Barker & Sloan, Inc., both management and economic consultants. The invoices for these services were customarily approved by DLN&I as reasonable and accurate. These have been paid in full by Alleghany. See Affidavit of Jared C. Horton, ("Horton Aff.").

Fordyce, Mayne, Hartman, Reynard and Stribling, a law firm of eminent standing in the St. Louis area, has, throughout this litigation, researched and advised my firm on questions of Missouri law relating to the dividends action, and has provided a number of other services in connection with discovery and litigation activities taking place in St. Louis. Alleghany has paid a total amount for these services of \$8,385.83.

Holland & Hart, a Denver law firm, provided us, during the initial stages of the litigation, with factual information with respect to prior litigation, and reviewed the complaints filed in connection with the dividend actions. John L. J. Hart, Esq. served as counsel for Alleghany during the MoPac Reorganization proceedings and was an important source of background information in connection with the instant matter. Amounts paid to Holland & Hart by Alleghany for services rendered in connection with the instant action total \$565.

Transportation Research, a financial consulting firm,
prepared, under the direction of Philip Maggio, the first analyses
of the financial and operating conditions of MoPac. Transportation

Research's studies and comments assisted my firm in the preparation of Alleghany's original Complaint, the initial development of plaintiffs' factual theories, and the drafting of the first set of interrogatories which were propounded to the defendants.

Mr. Maggio is a well-known security analyst who specializes in the transportation field. Prior to his work with Transportation Research, Mr. Maggio was associated with Argus Research in New York. For services rendered in connection with this case, Alleghany has paid Transportation Research a total amount of \$21,500.

Beginning in the summer of 1972, Temple, Barker & Sloan, Inc. ("TB&S") conducted extensive analyses of MoPac's financial and operating conditions and policies, and aided DLN&I in a orough evaluation of plaintiffs' existing factual theories and in the development of new ones. The objectives of these services were two-fold: in the short-run, to aid in answering defendants' searching interrogatories which inquired extensively into both the legal and factual bases for plaintiff's theory of the case, and in the long-run, to lay the groundwork for the presentation of expert testimony at trial. TB&S had virtually completed this work at the time the Settlement Agreement was executed. The performance of these services required TB&S to familiarize itself completely with the financial reports of the railroad, its internal accounting, large portions of the documents discovered and plaintiffs' legal theories. Dr. Paul Whiton Cherington, who directed these activities, is an eminent authority on transportation economics, was the principal trustee of the Boston & Maine Railroad and is presently President of that Railroad. Amounts paid to TB&S by Alleghany for its services relating to this matter total \$58,997.56.

Eric J. Klinger, a certified public accountant, also aided DLN&I's analysis of the financial and operating conditions of the MoPac. In particular, his services, which commenced in 1969, included an analysis of the financial substance of defendants' answers to plaintiffs' initial set of interrogatories, personal participation in the discovery of the MoPac's files at St. Louis, an analysis of the fruits of that discovery, and an evaluation of certain of plaintiffs' factual theories. Mr. Klinger is a Doctor of Law and Economics from the University of Vienna, and has been a Certified Public Accountant for the past 32 years. His services have been retained by plaintiffs in numerous stockholder and derivative suits, among which are Heddendorf v. Goldfine, D. Mass. Civ. A. No. 56-356, in which he assisted Abraham Pomerantz, Esq., and Escott v. Bar Chris, S.D.N.Y. No. 62 Civ. 3539. Amounts paid by Alleghany for Mr. Klinger's services in connection with the instant matter total \$20,604.73.

Alleghany has paid for all of the services, referred to in IV, a total amount of \$110,053.12.

V. Conclusion

As set forth above, the total amount paid by Alleghany to DLN&l for professional services rendered, and for expenses incurred by DLN&I, in connection with this action and the settlement thereof is \$739,946.88; the total amount paid directly by Alleghany for services of other law firms and financial experts specified above is \$110,053.12. The grand total of funds expended by Alleghany in connection with this litigation and the settlement thereof is \$850,000. I affirm that all funds so expended were

reasonable and necessary for the prosecution and settlement of this action.

John E. Tollin

Sworn to before me on this,

the the day of have , 1974

Notary Public

LUISA A. FERRARESE
Notary Fublic, State of New York
No. 41-6277025 Cucl. in Queens Co.
Certificate filed in New York County
Commission Expires March 30, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BETTY LEVIN, ALLEGHAMY CORPORATION and ROBERT LEVASSEUR,

67 Civ. 5095 (E.W.)

Plaintiffs,

AFFIDAVIT OF JARED C. HORTON

-against-

MISSISSIPPI RIVER CORPORATION
MISSOURI PACIFIC RAILROAD COMPANY,
ROBERT H. CRAFT, T. C. DAVIS
and THOMAS MILBANK,

Defendants.

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

JARED C. HORTON, being duly sworn, deposes and says:

:

I am a Vice-President, and the Secretary and Treasurer, of the Alleghany Corporation ("Alleghany") and have held these offices during the period of Alleghany's participation in the litigation and settlement of the above-entitled action (the "dividends suit") which began March, 1968.

During this period, my responsibilities included the payment of all bills sent to Alleghany and approved for payment by the appropriate Alleghany officers, and the maintenance, during the normal course of business, of complete and accurate records reflecting the receipt and payment of all such bills.

I have carefully read the Affidavit of John E. Tobin submitted herein in support of Alleghany's application to this Court for allowance and award to it of fees and expenses, and

hereby affirm that all figures stated therein relating to bills sent to, and paid by, Alleghany in connection with the dividends suit conform fully with Alleghany's financial records and, based upon those records, are a true and accurate representation of the funds paid or payable by Alleghany in connection with this action and the settlement thereof.

ared C. Sorton

Sworn to before me this

7th day of much, 1974.

Notary Public

FLORENCE R. DOUCH Notary Public, State of New York No. 31-6083675 Qualified in New York County Commission Expires March 30, 1976

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing Notice of Application of Alleghany Corporation for Counsel Fees and Expenses, Affidavit of John E. Tobin (with Exhibit A appended thereto) and Affidavit of Jared C. Horton were mailed by first class mail, postage prepaid, this 12th day of March, 1974, to:

Gerard M. Carey, Esq. 617 Third Street Brooklyn, New York 11215

Edward Garfield, Esq. Greenbaum, Wolff & Ernst, Esqs. 437 Madison Ave. New York, New York 10022

Ernest Ballard, Esq. LéBoeuf, Lamb, Leiby & MacRae One Chase Manhattan Plaza New York, New York 10005

Michael Paul Cohen, Esq. 7319 N. Oakley Chicago, Illinois 60645

Mr. Leon Schreiber 12 North Seventh St. Allentown, Pennsylvania 18101

Mr. Charles F. Wreaks 400 Main Avenue Bay Head, New Jersey 08742

Mrs. Roy L. Bell 4241 Cunaga Ave. Woodland Hills, Calif. 91364

Mr. Merrill W. Polancer 20 East Main St. Waterbury, Conn. 06702

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R.D. #1, Box 16
Colts Neck, New Jersey 07722

Mr. William R. Wesson 1550 Ocean Ave. Mantoloking, New Jersey 08738

Mr. Winchester F. Ingersoll, Jr. 381 Broadway Cambridge, Mass. 02139

Mr. Joseph Samone P.O. Box 58 Bradley Beach, New Jersey

Dillon & O'Brien 535 Fifth Ave. New York, New York 10017

Mr. John Charles Vaiani 1313 River Avenue Point Pleasant, New Jersey 08742

Mr. Robert W. Martz, Jr. 24 Morningside Drive Toms River, New Jersey 08753

Mr. Murray Yellen 2300 Olinville Ave. Bronx, New York 10467

Glern S. Koppel

7

South A

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

BETTY LEVIN et al.,

67 Civ. 5095 (EW)

Plaintiffs,

-against-

NOTICE OF MOTION

MISSISSIPPI RIVER CORPORATION et al.,

Defendants.

SIRS:

PLEASE TAKE NOTICE that upon the anaexed affidavit of Sheldon H. Elsen and Abraham L. Pomerantz, sworn to March 6, 1974, and upon all pleadings and proceedings heretofore had herein, the undersigned will move before the Hon. Edward Weinfeld, U.S.D.J., in Courtroom 102 of the United States Courthouse, Foley Square, New York, N.Y., on March 26, 1974, at 2:15 P.M., or as soon thereafter as counsel can be heard, pursuant to Rule 11B of the Civil Rules of this Court, for an order directing defendants Missouri Pacific Railroad Company and Mississippi River Corporation to pay to the applicants, Orans Elsen & Polstein and Pomerantz Levy Haudek & Block, the sum of \$2,000,000 as legal fees and the sum of \$22,422.06 for their disbursements, and granting said applicants such other and further relief as may be just.

Dated: New York, N.Y. March 6, 1974.

Yours, etc.

ORANS, ELSEN & POLSTEIN

Attorneys for Plaintiff
Betty Levin

109

One Rockefeller Plaza New York, N.Y. 10020 (212) 586-221

POMERANTZ LEVY HAUDEK & BLOCK

Attorneys for Plaintiff

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TO:

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Attorneys for Defendant
Mississippi River Corporation
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GERARD M. CAREY, ESQ. Attorney for certain Objectors 617 Third Street Brooklyn, N.Y. 11215

ERNEST BALLARD, ESQ.
LeBoeuf, Lamb, Leiby & MacRae
One Chase Manhattan Plaza
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ROBERT W. MARTZ, JR. 24 Morningside Drive Toms River, N.J. 08767

MURRAY YELLEN
2300 Olinville Avenue
Bronx, N.Y. 10467

	TABLE OF CONTENTS	Page
ī.	Application	1
II.	Summary of Proceedings	2
III.	Litigation Involved	3
IV.	Factors to be Considered in Awarding Fees	4
v.	Value of Benefits Conferred	4
VI.	Difficulty and Importance of the Case; Public Benefits Arising from the Case	7
vII.	Contingent Nature of Representation	8
VIII.	Qualifications of *Counsel	8
IX.	Services Rendered	13
	A. The voting rights litigation	13
	B. Applicants' prevention of legis- lative changes threatening the Class B's Supreme Court victory	19
	C. The dividend litigation	21
х.	Time Spent	30
XI.	The Agreement on Fees	31
XII.	Disbursements	33
XIII.	Conclusion	33

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

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DECRY LEVIN, ALLEGHANY CORPORATION and ROBERT LEVASSEUR,

Plaintiffs,

67 Civ. 5095 (EW)

-against -

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, : ROBERT H. CRAFT, T. C. DAVIS and THOMAS F. MILBANK,

Defendants. :

APPLICATION OF COUNSEL FOR PLAINTIFFS LEVIN AND LEVASSEUR FOR THE ALLOWANCE OF COUNSEL FEES AND EXPENSES

STATE OF NEW YORK) SS.: COUNTY OF NEW YORK)

SHELDON H. ELSEN and ABRAHAM L. POMERANTZ, each have been duly sworn, depose and say:

I. APPLICATION

Pursuant to this Court's decision of March 19, 1973, 59 F.R.D. 353, aff'd on opinion below, sub. nom. Wesson v. Mississippi R. Corp., 486 F.2d 1398 (2d Cir. 1973), cert. deniei, U.S. ____ (1973), and the order and judgment of May 2, 1973. this joint application for attorneys' fees and expenses is filed by Orans, Elsen & Polstein and Pomerantz Levy Haudek & Block, counsel for plaintiffs Betty Levin and Robert LeVasseur, respectively.

This application is also made on behalf of the foilowing associated counsel in the present action and counsel in related predecessor actions:

John Lowenthal and

Szold, Brandwen, Meyers & Altman, of New York,

Counsel for plaintiffs Betty Levin, Jane Harris, and Nathan Stutch;

Sherin & Lodgen, of Boston,

Counsel for plaintiff Betty Levin;

Harold P. Ackert, of St. Louis,

Counsel for plaintiffs Rose Slayton, Joseph M. Proskauer, Walter Mendelsohn, Alfred L. Rose and Dorothy B. Rose.

The services rendered by each of the above-named counsel are specified below. Because of agreement among them, it will not be necessary for the Court to allocate the total allowance among such counsel.

II. SUMMARY OF PROCEEDINGS

This application seeks an award for services rendered over a period of ten years in the present action and integrally related predecessor actions. The litigation was concluded by a settlement agreement that conferred a benefit of about one hundred million dollars on the Class B stockholders of defendant Missouri Pacific Railroad Company ("MoPac"). The obligation to pay fees would normally rest upon the benefited class, namely, the Class B stockholders; but a significant part of the settlement agreement is that it relieves the class of that burden: The two corporate defendants, MoPac and Mississippi River Corporation ("Mississippi"), have agreed to pay such fees as the Court may award.

The settlement notice stated the intention of applicant counsel to apply for an allowance of \$6,953,000, which they did

and do believe would be fair and reasonable, based on the value of the benefits that their efforts produced for the class. MoPac and Mississippi announced their intention to oppose such an application. Both sides, however, were anxious to avoid the uncertainty, time and effort involved in litigating the amount of the fee. Accordingly, applicants and the corporate defendants entered into negotiations. After the approval of the settlement by the Court, by the stockholders, and by the Interstate Commerce Commission ("ICC"), an agreement was reached: MoPac and Mississippi agreed that they would not oppose a total fee allowance of \$2,000,000 plus reimbursable expenses, and applicant counsel agreed to reduce their claims to that amount. This agreement is, of course, subject to the Court's approval, but, for reasons stated in the brief submitted herewith, it is entitled to carry great weight with the Court, and should be departed from only for compelling reasons, which we do not believe are present.

III. LITIGATION INVOLVED

The Court is thoroughly familiar with the litigation involved, including the voting rights litigation described below; see 59 F.R.D. at 358-360. This application relates to all phases of the ten-year litigation, both in computing benefits conferred on the class and in describing the services rendered, for none of which have any of the applicant counsel heretofore received compensation. The legal basis for including the voting rights litigation in the allowance sought is discussed in the accompanying brief.

IV. FACTORS TO BE CONSIDERED IN AWARDING FEES

The major factors considered by the courts in the award of fees in class actions have been:

- 1. The benefits conferred;
- 2. The difficulty and importance of the case;
- 3. The contingent nature of the fee;
- 4. The benefits accruing to the general public from the suits;
- 5. The skill, experience, and standing of plaintiffs' counsel and of their adversaries;
 - 6. The time spent in the litigation.

The relative importance of these factors, together with citations of authority, is analyzed in the accompanying brief.

V. VALUE OF BENEFITS CONFERRED

The value of the benefits conferred is calculable by computing the recovery for the MoPac Class B resulting from the litigation and settlement, and subtracting therefrom the value that the stock would have absent the litigation.

In summary, the Court's decision evaluates the gross settlement at about \$2,450 for each Class B share (59 F.R.D. at 368), a total of \$97,340,950 for all 39,731 shares. Without the litigation and the settlement, the Class B stock would have a value of \$21,057,430, as shown below. The difference, about \$76 million, represents the readily computable value of the benefits conferred on the Class B stockholders by the litigation and settlement. In addition, there are very substantial intangible benefits.

1. The gross value of the settlement of \$2,450 for each Class B share consists of \$850 cash, plus 16 shares of new

MoPac common stock. Since each new common share is worth about \$100 (59 F.R.D. at 368), the gross value of the settlement is \$2,450 per share. With 39,731 Class B shares outstanding, the aggregate gross value of the settlement is \$97,340,950.

- 2. The value that the Class B stock would have without the litigation and settlement can be computed in two fashions:
- (a) The voting rights litigation compelled MoPac to abandon its plan of consolidation of 1963. That plan, if consummated, would have reduced the Class B's interest in MoPac's equity and earnings to 2 percent; Slayton v. Missouri Pac. R. Co., 233 F.Supp. 747, 752 (E.D. Mo. 1964). Since the railroad's value, based on capitalization of its earnings, is between \$225 and \$243 million (59 F.R.D. at 369), the 2% interest of the Class B would amount to less than five million dollars.
- would have without the litigation and settlement can be computed on the basis of market prices. When the Class B's future was bleakest -- after MoPac's voting rights victory in the Eighth Circuit -- the Class B dropped to a low of \$530 in the over-the-counter market.* Although even this price may have been enhanced by the possibility of certiorari, and although the market in Class B stock was so thin that \$530 could probably never have been realized, we are willing to assume that figure as accurate. On that basis, the value for all 39,731 Class B shares would have been \$21,057,430.

^{*} See Missouri Pac. R. Co. v. Slayton, 407 F.2d 1078, 1081 (8th Cir.), cert. denied, 395 U.S. 437 (1969): "* * * the record before us shows that the market price of a Class B share had dropped from a value of \$1,392 just prior to our decision (rejecting class voting rights) to \$530 just prior to the Supreme Court's granting of certiorari * * *."

The last mentioned figure, subtracted from the gross value of the settlement, results in a readily computable net benefit to the Class B of \$76,283,520. *

3. In addition to the benefits thus computed, the settlement confers other advantages of great substance on the Class B:

The annual dividend on each Class B share will rise from \$5 to \$80 (59 F.R.D. at 362), or by \$3 million per year for the class.

"The conversion of the Class B stock into sixteen shares makes them more marketable" (59 F.R.D. at 363) and will significantly enhance the liquidity and value of the stock. This meets Levin's specific complaint of defendants' failure to split the Class B stock (Id. and 59 F.R.D. at 359, n.8).

"Additionally, at the present time the Class B stock elects no directors. Under cumulative voting, the new common stock would have the means of representation on the Board of Directors." 59 F.R.D. at 363.

The resolution of the corporate impasse "will afford MoPac the opportunity to pursue merger prospects so vital to its economic growth and existence." 59 F.R.D. at 373.

Finally, the settlement relieves the Class B from bearing the expenses of this litigation, including the counsel fees here sought.

The aggregate value of these benefits, although not readily computable, is so large as to afford both an independent and a supplemental basis for the allowance here sought.

^{*}Alleghany seeks reimbursement of attorneys' fees and expenses incurred only in the dividend action (Stipulation of Settlement §8), and therefore uses a lower measure of net benefit, not including the benefits produced by the voting rights litigation.

In sum, the settlement benefits to the Class B substantially exceed \$76 million, and are, we submit, in the area of \$100 million.

VI. DIFFICULTY AND IMPORTANCE OF THE CASE; PUBLIC BENEFITS ARISING FROM THE CASE.

After MoPac announced its merger plan in December 1963, we brought the first voting rights suits, and undertook the fundamental factual and legal research. The difficulties of that litigation are readily apparent from the conflicting decisions therein by the District Court (233 F.Supp. 747), the Court of Appeals (359 F.2d 106), and the Supreme Court (386 U.S. 162). Beyond these matters, however, we had to consider, research and deal with countless additional problems, as shown by the description of our services set forth below.

We also initiated the dividend action and undertook
the fundamental factual and legal research. The difficulties
of that action are referred to in this Court's decision (59
F.R.D. at 363-366). Our part in the welter of procedural motions,
interrogatories and depositions, the analysis of the huge amount
of documentary evidence assembled up to the very eve of trial,
the delicate, complex and long-drawn settlement negotiations,
the settlement hearing, and the appeal from the Court's approval
of the settlement -- all this is alluded to below in the description of our services, and is largely known to the Court.

The importance of the case does not require elaboration. The very existence of the Class B was threatened, first by MoPac's merger plan of 1963 and, after that plan was defeated, by the withholding of any but nominal dividends on the B stock.

The public benefits accruing from the litigation are discussed in our accompanying brief.

VII. CONTINGENT NATURE OF REPRESENTATION

All counsel and associate counsel who join in this application have rendered their services to the class on a wholly contingent basis. After ten years of strenuous litigation, none of them has received any payment to date.

VIII. QUALIFICATIONS OF COUNSEL

Counsel for the independent (minority) Class B stock-holders brought to this case a unique combination of experience in stockholder litigation and intimate knowledge of MoPac. As this Court noted (59 F.R.D. at 367):

"* * * These three plaintiffs and their counsel
over a long period have been alert to enforce
the rights of Class B stockholders. The lawyers for the plaintiffs in this action also
represented them in the Missouri voting rights
case and, over Mississippi's strong opposition,
successfully upheld the right of the Class B
stockholders as a separate group to vote upon
consolidations. They are particularly knowledgeable
with respect to the basic facts of MoPac and
the hard core issues of this litigation; they
are especially experienced in this field of law."

The Court also noted that these applicants, representing minority Class B stockholders, "have acted independently of Alleghany's counsel in representing the interests of the Class B minority shareholders" (59 F.R.D. at 367).

Abraham L. Pomerantz has been practicing law for more than 48 years. His firm has specialized in corporate litigation, largely class and derivative, for 33 years, representing both plaintiffs and defendant corporations or their directors, including Pepsico (Pepsi Cola); Carte Blanche Corporation; Webb & Knapp, Inc.; United States Smelting and Refining Company; Gulf & Western Corporation; Cott Corporation; United Artists Theatre

Corporation; Crane Co.; New Jersey Zinc Corp.; 20th Century Fox; Paramount Pictures; United States Freight; Textron; and Glen Alden.

As to the quality of the work of Mr. Pomerantz and his firm, reference may be made to the opinions of others.

The United States Court of Appeals for the First Circuit, referring to and quoting the District Court, stated in connection with a fee awarded to the Pomerantz firm:

** * the court took occasion to commend the skill, industry, shrewdness and ability of Mr. Pomerantz * * *. 'Here we have had the benefit of the most intensive investigation by one of the country's foremost specialists in this type of litigation.'" Angoff v. Goldfine, 270 F.2d 185, 192-3 (1st Cir. 1959).

Again, Judge Leonard Moore, of the United States Court of Appeals for the Second Circuit, said:

general counsel (Abraham L. Pomerantz of the firm of Pomerantz, Levy & Haudek) was designated for the plaintiffs in the state and federal suits. Such counsel and his firm were most skilled and experienced (at least for over twenty years) in ferreting out fraud on the part of directors alleged to have been more mindful of serving their own interests than those of the corporations whose interests they should have been serving." Alleghany Corporation v. Kirby, 333 F.2d 327, 328 (2d Cir. 1964).

Judge Moore also quoted with approval Judge Wyzanski's statement as follows:

"Moreover, Mr. Pomerantz's judgment as to the value of so much of the claims as fall within the first four categories of the complaint is a judgment not only based on painstaking preparation but also reflecting an almost unparalleled experience in this type of litigation. * * * His support of the compromise embodies the pragmatism of a man whose shrewdness few antagonists have ever doubted." Ibid, n. 1.

William E. Haudek, a senior partner of the same firm for 30 years, was formerly an associate judge of the District Court of Berlin, Germany. He is a member of the Committee on the Federal Courts of the New York County Lawyers' Association, and is the author of extensive legal publications. In Rosenfeld v. Black, 56 F.R.D. 604, 606 (S.D.N.Y. 1972), Judge Gurfein referred to "the incisive thinking and painstaking research * * * of Messrs. Pomerantz and Haudek, two acknowledged leaders in the field of derivative shareholders' actions."

Sheldon H. Elsen, a senior partner of Orans, Elsen & Polstein, is an experienced trial lawyer who has tried many important cases, both civil and criminal. Mr. Elsen is a former Assistant United States Attorney for the Southern District of New York, and has served for several years as Adjunct Professor of Law at Columbia University, where he teaches trial practice and gives seminars in litigation problems, including a seminar in complex litigation. Mr. Elsen has published several law review articles; his writings have been cited with approval by the courts, including the Supreme Court of the United States. He is a former chairman of the Committee on Federal Legislation of the Association of the Bar of the City of New York, has testified frequently on behalf of the Association before subcommittees of the United States Senate and House of Representatives. He now serves as a member of the Association's Committee on the Judiciary, and he is a member of the American Law Institute.

Lewis Shapiro was first an associate, and, from
January 1971, a partner, of Mr. Elsen's firm. He is a former
clerk to the Honorable Richard Levet, and he is a lawyer of
substantial experience, with particular expertise in federal
litigation and stockholder litigation.

John Lowenthal first represented MoPac common stockholders in 1955, when the MoPac fourth and final plan of bankruptcy reorganization was being evolved. Mr. Lowenthal was retained specifically to protect the rights of the old common stockholders, who were to receive the new Class B stock. The final plan of reorganization, which entitled the Class B to all the residual earnings of MoPac, required extensive amendments to the MoPac certificate of incorporation. Mr. Lowenthal reviewed successive drafts of the amendments, and recommended changes therein, designed to assure the full protection of the Class B's exclusive residual rights under the final plan. In the ensuing years, Mr. Lowenthal, representing Betty Levin and Jane Harris among other Class B stockholders, maintained close contact with MoPac developments, and built files of data used in the litigations to come. Following Mississippi's entry into the MoPac picture and drive for control through acquisition of MoPac Class A stock, another Class B stockholder, Nathan Stutch, retained Mr. Lowenthal in 1961 to prepare for what was to become the litigation commenced in 1963.

Mr. Lowenthal has practiced law since 1951. Among the other stockholder litigations in which he has participated was the dividends dispute between the preferred and common stockholders of another major railroad, culminating in St. Louis Southwestern Railway Co. v. Loeb, 318 S.W.2d 246 (Mo. 1958). Since 1965, Mr. Lowenthal has been a Professor of Law at Rutgers Law School.

Maxwell Brandwen first represented MoPac security holders shortly after the MoPac petition in bankruptcy was filed in 1933. In the course of the reorganization proceedings, Mr.

Brandwen appeared before the Supreme Court* and several times before the Court of Appeals for the Eighth Circuit, in the ultimately successful struggle against forfeiture of the MoPac security holders' rights.

Mr. Brandwen has practiced law continuously since 1922. He is a senior partner of Szold, Brandwen, Meyers & Altman. He has represented substantial interests in many corporate reorganizations since 1923.** His firm did and does represent a variety of large financial interests, including Kirkeby-Natus Corporation (now United Ventures), Federated Mortgage Investors, The Amalgamated Bank of New York, and numerous cooperative housing corporations, including the largest cooperative housing project in the world.

The defendants in this litigation were represented by many of the most eminent lawyers in the country:

- (1) Sullivan & Cromwell;
- (2) Dewey, Ballantine, Bushby, Palmer & Wood;
- (3) Leon Leighton;
- (4) Bryan, Cave, McPheeters & McRoberts, of St. Louis;
- (5) Guilfoil, Caruthers, Symington & Montrey, of St. Louis;
- (6) Arnold & Porter, of Washington, D. C.

^{*} Comstock v. Group of Institutional Investors, 335 U.S. 211 (1948).

^{**} These reorganizations, some of which involved litigation and appearances by Mr. Brandwen before the Courts of Appeals, included the reorganization of E. F. Drew & Co., Habirshaw Cable, McClellen Stores, McCrory Stores, Paramount Pictures, Arrow Pictures, and Brotherhood of Locomotive Engineer Securities Corporations.

IX. SERVICES RENDERED

A. The voting rights litigation

Litigation between the two classes of MoPac stock first broke out in December of 1963, after Mississippi had acquired control of MoPac through a majority of the Class A stock. In that month, MoPac announced a plan to consolidate itself and its subsidiary, The Texas and Pacific Railway Company ("T&P"), with a new shell corporation, which had no assets and had been created to be the surviving corporate entity. The plan treated each share of MoPac stock of both classes equally, notwithstanding their different rights and values: Each share of each class was to be surrendered for four shares of the single class of stock of the new corporation. That would have cut the Class B's interest in MoPac's residual assets and earnings from 100% to 2%, depriving the Class B of more than \$200 million of MoPac's 1963 net assets (after the Class A). Slayton v. Missouri Pac. R. Co., supra, 233 F. Supp. at 750. What the Class B would have lost, the Class A (principally Mississippi) would have gained.

MoPac announced that the plan, which its board had already approved, would be submitted to its stockholders for approval by a collective, not a class, vote.

We immediately brought suit as follows:

- (1) Rose Slayton, represented by the Pomerantz firm and Mr. Ackert, commenced an action in the United States District Court for the Eastern District of Missouri on December 9, 1963 (with subsequent intervention by Joseph M. Proskauer, Walter Mendelsohn, Alfred L. Rose and Dorothy B. Rose).
- (2) Jane Harris and Nathan Stutch, represented by Mr. Brandwen's firm and Mr. Lowenthal, commenced an action in this Court on January 31, 1964 (transferred to Missouri in July 1964).

- (3) Alleghany, represented by the firm of Donovan, Leisure, Newton & Irvine (the "Donovan firm"), commenced an action in the Eastern District of Missouri on February 5, 1964.
- (4) <u>Betty Levin</u>, represented by Mr. Brandwen's firm and Mr. Lowenthal, commenced an action in the Eastern District of Missouri on February 18, 1964.

The plan of consolidation raised many complicated and novel legal issues. In preparing the complaints for Slayton, Harris, Stutch, and Levin, we began our analyses of the classvoting provisions in MoPac's certificate of incorporation, in the light of the bankruptcy reorganization proceedings; the legal effect of the decisions by the ICC and the bankruptcy court in fixing those class-voting provisions; the relationship between the Bankruptcy Act, which makes such voting provisions binding, and the Interstate Commerce Act, which defers to state-law voting requirements; Missouri statute and common law, and their relationship to the MoPac plan of reorganization and certificate of incorporation; whether the plan of consolidation was within the jurisdictional scope of the Interstate Commerce Act; judicial estoppel arising from MoPac's earlier successful reliance before the ICC on the class-voting provisions as being applicable to mergers and consolidations; national transportation policy; the law of fiduciary obligations of corporate directors and stockholders; and many other issues, substantive and procedural, federal and state.

From the start, these cases, because of their magnitude and importance, were personally conducted by senior attorneys for the independent (minority) Class B stockholders. This proved to be the most efficient and effective way to do the job, bringing to the lengthy proceedings continuity, experience, and

the greatest knowledge of MoPac. Messrs. Pomerantz and Haudek, Mr. Brandwen, and Mr. Lowenthal drafted the complaints and the many briefs submitted on behalf of their clients to the District Courts, Court of Appeals, and Supreme Court. These senior attorneys attended the conferences with the District Court in St. Louis, and conducted research in Washington, D. C., in the libraries of the ICC and the Association of American Railroads. In addition, they had the assistance of junior partners and associates in the Pomerantz and Brandwen firms; of Betty Levin's Boston counsel, Sherin & Lodgen; and of local St. Louis counsel.

The complaints in <u>Slayton</u>, <u>Harris</u> and <u>Stutch</u>, and <u>Levin</u> all sought, <u>inter alia</u>, to enjoin the plan of consolidation as a fraud on the Class B stockholders in violation of the fiduciary obligations of the MoPac directors and of Mississippi as the controlling stockholder of MoPac, and declaratory judgments that separate stockholder class consent would be required for approval of the plan of consolidation.

The defendants filed various motions to dismiss the Slayton, Levin, and Alleghany complaints. Among the grounds urged for dismissal were that the ICC had exclusive jurisdiction under the Interstate Commerce Act to consider the plan of consolidation, and that the complaints showed on their faces that there was no right to class voting on the plan.

The defendants filed two initial briefs -- one for Mississippi and the MoPac directors, and one for MoPac -- covering a multitude of grounds urged for dismissal. We filed separate briefs for Slayton and Levin, covering, between us, issues relating to the MoPac certificate of incorporation, the Interstate Commerce Act, Missouri statute and common law, judicial estoppel, the court's power to enjoin the plan as a

fraud, and other contentions of the defendants.

At the hearing of the motions to dismiss, the court and all parties, recognizing that the voting rights question alone was potentially decisive of the entire litigation, agreed to have only that question decided in the first instance.

Counsel for defendants then filed a joint brief addressed solely to that issue, and counsel for all plaintiffs filed a joint response thereto, followed by an additional hearing.

Messrs. Pomerantz, Lowenthal, and Brandwen, and a member of the Donovan firm presented oral arguments at these hearings.

Throughout the litigation, counsel for all plaintiffs were in constant communication with one another, exchanging data, ideas, and drafts of briefs, and filing joint briefs where that seemed in their clients' best interests. Although each plaintiff represented the entire class, representation of the independent stockholders separately from Alleghany was always maintained. Separate representation was significant because of potential divergences of interest between Alleghany and the other Class B stockholders, and because the independent stockholders wanted their attorneys' experience and knowledge of MoPac brought to bear in the litigation. The presence of two separate teams of independent stockholders' attorneys carried the added advantage of different approaches for their separate briefs and arguments; close cooperation obviated duplication of effort, and was aimed at maximum over-all effectiveness.

On July 13, 1964, the District Court upheld plaintiffs' claims to class voting rights, and denied the motions to dismiss.

<u>slayton v. Missouri Pac. R. Co.</u>, 233 F. Supp. 747 (E. D. Mo. 1964).

The defendants took interlocutory appeals.

In support of their appeals, defendants' attorneys

filed two main and two reply briefs in the Court of Appeals. Our separate answering briefs necessarily dealt with all points raised and argued by the defendants. Messrs. Pomerantz, Lowenthal, Brandwen, and a member of the Donovan firm went to St. Louis for the oral argument. Because of the illness of an attorney for the defendants, the court session was adjourned, and the argument rescheduled for several days later, when Messrs. Pomerantz and Lowenthal, together with a member of the Donovan firm, presented the oral argument for the appellees.

On April 19, 1966, the Court of Appeals unanimously reversed, holding that a separate class vote was not required for the plan of consolidation. Mississippi River Fuel Corporation v. Slayton, 359 F.2d 106 (8th Cir. 1966).

We then studied the ramifications of further litigation in the District Court on the reserved issues on defendants' motions to dismiss, and, alternatively, of proceeding before the ICC as the Court of Appeals had suggested in its opinion. Either of those routes, however, portended years of litigation, at tremendous expense to MoPac and its stockholders, of uncertain outcome, and in any event still leaving the Class B's rights and values permanently impaired by the Court of Appeals' decision. Accordingly, we decided to seek writs of certiorari.

Two separate petitions were filed by the three teams of plaintiffs' attorneys. MoPac retained the firm of Arnold & Porter to oppose the petitions. Arnold & Porter conceded that the case was "complex and unique", but contended that it had no significance except to the parties (MoPac br. in opp. to cert. at 21).

The independent (minority) Class B stockholders filed a reply brief, in which we urged that review was warranted by

the national public interest in the proper application of the Interstate Commerce Act to railroad mergers.

The Supreme Court granted writs of certiorari on October 10, 1966.

In response to ar briefs on the merits in this
"complex and unique" case, the defendants filed two briefs
totalling nearly 200 pages, presenting ten questions involving
31 different sections of federal and state laws and constitutions.
We filed extensive reply briefs.

The oral argument for petitioners in the Supreme Court was presented by a partner of the Donovan firm and by Mr.

Lowenthal, who also presented the reply argument.

The Supreme Court unanimously reversed the Court of Appeals on February 27, 1967, and remanded the cases to the District Court. Levin v. Mississippi River Fuel Corporation, 386 U.S. 162 (1967). The Supreme Court held that, under the applicable Missouri corporation statute -- which the Interstate Commerce Act made controlling, and which in turn deferred to the stockholder voting provisions in MoPac's charter adopted in the bankruptcy reorganization -- separate class voting was required for the plan of consolidation.

As a result of the Supreme Court decision, MoPac withdrew its plan of consolidation from consideration by the ICC.

Back in the District Court, the defendants sought to pursue their motions to dismiss the complaints on the issues previously reserved, and without notice to the stockholders. Applicant attorneys for independent (minority) Class B stockholders, however, sought a determination of class action status, a declaratory judgment upholding the Class B's class voting rights, and, on notice to the stockholders, dismissal without

prejudice on the reserved issues.

After lengthy proceedings and repeated hearings before the District Court, attended by Messrs. Pomerantz, Haudek, and Lowenthal, the District Court fully sustained our position.

B. Applicants' prevention of legislative changes threatening the Class B's Supreme Court victory

The Missouri corporation statute was a vital cornerstone of the Class B's successful ten-year struggle; for the subsequent dividend litigation and settlement depended on the Class B's 1967 victory in the Supreme Court; and the Supreme Court's decision, in turn, rested on its interpretation of the Missouri corporation statute:

"[W]e hold only that, in a consolidation as proposed here, Missouri law must be applied and that § 351.270 of that law requires the application of the Articles of Association of MoPac . . . " Levin v. Mississippi River Fuel Corporation, 386 U.S. 162, 170 (1967).

Section 351.270 (of the Missouri General Business Corporation Law) was a fragile and vulnerable prop for the future security of the Class B. If the statute were to be changed to override charter provisions for stockholder voting on consolidations, as in some other states, then the Supreme Court decision would be circumvented and the Class B would lose its principal protection against being swamped by the Class A in some future "plan of consolidation".

Mr. Lowenthal was concerned that just such a change in the Missouri statute might be attempted after the 1967 Supreme Court decision. That he had good reason for concern was confirmed five years later (1972), during a deposition in the dividend litigation, in which it was testified that the chief executive officer of MoPac and chairman of the board of Mississippi, William G. Marbury (who had died in 1971), at a meeting

with some Class B stockholders --

"had said that he [Marbury] would go to Jeff[erson] City, Missouri, to get the corporation laws of Missouri changed so that he could adjust the B stock and put it in its place to depress it further." (Deposition of Robert LeVasseur, Aug. 22, 1972, at 53-54).

Because Mr. Lowenthal feared just such a step undermining the 1967 Supreme Court decision, he contacted officers of the Missouri Bar in Jefferson City for advice on how to keep abreast of all proposals to amend the Missouri statutes and Constitution affecting corporations. Keeping track of such proposals turned out to be no small task for a distant non-member of the Missouri Bar. The principal means finally worked out was for Mr. Lowenthal to obtain and review the bi-weekly Missouri Legislative Digest of all bills introduced, and then, for any bill of possible interest, to ascertain its status, and follow it up through committee chairmen and counsel.

In April 1969, Mr. Lowenthal read the following item in the Legislative Digest:

"HB 888 CORPORATIONS: Relates to general business corporations and includes provisions concerning voting, merger, and consolidation."

Mr. Lowenthal obtained a copy of the bill, and of an "Explanatory statement" of the Corporation Law Committee that the bill "codifies" the Supreme Court holding in Levin v. Mississippi River Fuel Corporation, supra.

The text of HB 888, however, created a complicated, unpledictable, and seemingly irrational pattern of changes -- one of which was to deny class voting rights to most common shares on margers and consolidations.

Mr. Lowenthal apprised the Donovan firm of the problem, consiled at length with members of the Corporation Law Committee

about the bill, and prepared an analysis of the bill that was used as "Comments in Opposition" by committee members and a key legislator. After several months of such efforts, HB 888 was stricken from the House calendar and withdrawn.

As a result of Mr. Lowenthal's role in the demise of HB 888, the Missouri Bar Corporations Committee then asked Mr. Lowenthal to redraft all the related Missouri Corporations Code sections dealing with class voting. Mr. Lowenthal accordingly redrafted nine sections, and drafted one entirely new section, with explanatory comments, for the Corporations Committee.

C. The dividend litigation.

The 1967 Supreme Court decision upholding the Class B's class voting rights in Levin v. Mississippi River Fuel Corporation, supra, cleared the way for Levin's dividend action, which we filed later that same year, after MoPac had declared its final dividends for the year. However, more than two years earlier, we had formally asserted the Class B's claim to reasonable dividends.

On December 2, 1964, while the defendants were preparing their interlocutory appeals to the Eighth Circuit in the voting rights litigation, MoPac declared a special dividend on its Class A stock, bringing the total for that year (1964) to \$5 per share (\$9.25 million on all Class A shares) -- the maximum allowable on the Class A in any year, the first time the maximum had ever been declared on the Class A, and a prerequisite to the Class B's entitlement to any dividend. At the same time (December 2, 1964), the MoPac board of directors also declared the first dividend ever paid on the Class B -- but only \$5 a share (\$198,655 on all Class B shares), a mere 1.3 percent of that year's residual earnings on the Class B. That dividend was, of course, consistent with MoPac's then pending plan of consolidation, treating each Class B share identically with each Class A share; but we were challenging that plan in court, not only on the voting rights issue, but also on the merits.

Accordingly, on December 18, 1964, Mr. Lowenthal, on behalf of independent (minority) Class B stockholders, made a demand on the MoPac board of directors for reasonable dividends on the Class B stock. The demand letter, with copies to each director and to Mississippi, contained the basic economic analyses and legal arguments later set forth in the complaints in the dividend litigation. (A copy of the demand letter is annexed hereto as Exhibit A.)

The defendants did not reply to the demand for reasonable dividends, but went ahead with their interlocutory appeals, filing their initial briefs the next month (January 1965).

upholding the Class B's class voting rights, and throughout the spring, summer, and fall of 1967, Mr. Lowenthal, on behalf of a group of Class B stockholders that cwned about 10% of the stock of the class, conducted further research on the questions of law involved in an action to compel reasonable dividends, and assembled and analyzed up-to-date economic data on MoPac and a dozen other major railroads. He reviewed the options available to Class B stockholders under the law, and conferred with a number of legal and financial experts in this area. He prepared several drafts of what became the Levin complaint, which was the prototype for all the plaintiffs' complaints.

In the months of November and December 1967, Mr. Lowenthal entered into discussions with the firm of Orans, Elsen &
Polstein, for the purpose of having that firm join him in the
prosecution of a class action for dividends. In December of 1967,
Messrs. Elsen and Shapiro reviewed Mr. Lowenthal's legal research,
his theories, and his drafts of the complaint, undertook independent research, revised the complaint with Mr. Lowenthal, and commenced this action on December 27, 1967.

In approximately the same time period, the firm of Pomerantz, Levy, Haudek & Block performed essentially similar work, and, on January 19, 1968, began an action on behalf of Mr. LeVasseur in the United States District Court for the Eastern District of Missouri.

Consultations began between both sets of counsel and counsel for Alleghany, which was considering litigation, to determine whether Mr. LeVasseur and Alleghany should enter the Levin action and a joint effort should be mounted. The result of these discussions was a unified strategy and the creation of a joint litigation team. It was decided that the action should be maintained in New York, subject to any motions to transfer and the Court's disposition of them. Mr. LeVasseur and Alleghany moved this Court for leave to intervene in the Levin case, with the consent of Mrs. Levin. Alleghany's motion to intervene was granted on May 2, LeVasseur's motion on September 24, 1968.*

Considerable research and analysis was devoted to problems of forum, as well as to preparation for managing the case as a single class action.

At the beginning of February 1968, the defendants moved this Court to transfer the Levin case to Missouri; to dismiss for failure to join indispensable parties; to dismiss on the ground of forum non conveniens; or to stay the action pending the outcome of the LeVasseur action in Missouri. Defendants filed voluminous moving and reply affidavits, supported by two briefs, plus additional post-argument papers; we filed extensive opposing and rebuttal affidavits, likewise supported by two briefs, together with post-argument papers.

The Pomerants firm was med with a welter of motions in LeVasseur's missouri action. Ultimately, that action was discontinued in favor of the New York action.

The motion was argued on March 15, 1968, by Mr. Elsen for the plaintiffs. On July 30, 1968, Judge Herlands ruled in favor of plaintiffs on all branches of the motion (289 F.Supp. 353).

While we were awaiting Judge Herlands' decision,

Messrs. Elsen and Haudek, together with members of the Donovan

firm, organized the staff work, documents, files and research

that a litigation of this magnitude required. We collaborated

closely with the experts retained for plaintiffs. Originally,

the firm of Peat, Marwick, Mitchell & Co. started on the accounting questions, and Mr. Philip J. Maggio, of Transportation Research, an expert in the field of railroad economics, on the

economic questions. These experts were later joined and to some

extent supplanted by Eric Klinger, an accountant who specializes

in stockholder litigation, and who has worked on many matters

with the Pomerantz firm. In the period of intensive trial

preparation in 1972 additional experts were retained. This team

of lawyers and experts pored through vast amounts of legal, sta
tistical, and economic material.

In the summer of 1968, Mr. Haudek drafted plaintiffs' first set of interrogatories. The interrogatories, as revised by all counsel, were served in November and December 1968.

Those to MoPac, consisting of 67 interrogatories with many subparts, filled over 21 pages; those to Mississippi, consisting of 29 interrogatories with many subdivisions, took 11 pages.

Also in the fall of 1968, plaintiffs jointly moved under Rule 23(c) and (d), F.R.C.P., for a class suit determination pursuant to Rule 23(a), (b)(1) and (2). The defendants of posed the application and sought to impose conditions.

Plaintiffs filed affidavits and two briefs, which they prepared

jointly. On September 24, 1968, Messrs. Pomerantz and Elsen argued the motion on behalf of plaintiffs; and on October 9, 1968, Judge Bryan unconditionally granted class action status.

Notice was thereafter mailed to the class. On December 19, 1968, Rosalie J. Leventritt and Roland L. Berner, Trustees, represented by Leventritt, Lewittes & Bender, moved for leave to intervene and to add an antitrust cause of action.

All of plaintiffs' counsel agreed that the Leventritt application posed a major threat to the manageability of the litigation.

Plaintiffs jointly filed a brief and affidavit in opposition.

After argument for plaintiffs by Mr. Elsen and an associate of the Donovan firm, Judge Herlands, on July 15, 1969, denied the motion to intervene (47 F.R.D. 294).

MoPac and Mississippi meanwhile completed their study of plaintiffs' interrogatories, and on February 21, 1969, served written objections. On March 12, 1969, pursuant to General Rule 9(f), a meeting (lasting seven hours) took place between all counsel, including not only New York counsel but also St. Louis counsel and house counsel for defendants, in an effort to resolve the issues by agreement. Before that meeting, Mississippi served partial answers on March 3, and MoPac on March 11. After the meeting, and after the items in dispute had been resolved by a stipulation in June 1969, Mississippi served further answers on July 9 and MoPac on July 12, 1969.

MoPac's detailed answers to plaintiffs' interrogatories took over 150 pages, and included a number of statistical and other schedules; Mississippi's answers took over 30 pages.

These answers were followed by plaintiffs' extensive demands for the production of documents. Pursuant to agreements with defendants' counsel, plaintiffs conducted intensive discovery

of defendants' files in St. Louis, and secured production of documents both in St. Louis and in New York; this discovery work was led by the Donovan firm and Mr. Klinger in 1969 and 1970.

Messrs. Elsen, Haudek, and Lowenthal analyzed and studied thousands of documents, and subjected them to scrutiny from evidentiary and tactical points of view.

On November 18 and 19, 1971, a team of plaintiffs attorneys, led by Mr. Elsen, took the deposition of defendant T. C. Davis, a MoPac director, member of the executive committee, and former chief executive officer, who had been connected with the company for 30 years. This deposition dealt not only with recent events but also with those of the bankruptcy reorganization period, when Col. Davis was chairman of the board. Col. Davis was examined on statements made at stockholder meetings and to the press; on company minutes and memoranda that bore directly or circumstantially on dividend policy; on company reports and expersistudies relating to the proposed consolidation with T&P, which was defeated as a result of the voting rights litigation; and on numerous other items of importance to the litigation.

Shortly after we examined Col. Davis, the defendants requested a moratorium on litigation so that settlement talks could be conducted without distraction.

In May 1972, the case was assigned to Judge Weinfeld. At a conference with the Court on May 19, the case was adjourned for one week, to see if a settlement could be reached. However, the parties remained far apart, and the Court scheduled the case for trial on December 4, 1972. Intensive litigation was thereupon resumed in June 1972.

On June 21, June 22, and September 20, 1972, a team of plaintiffs' attorneys, led by Mr. Elsen, conducted an extensive examination of the defendants' chief executive officer, Downing B. Jenks, chairman of the board of MoPac and president of Mississippi. For this examination, plaintiffs' counsel employed literally hundreds of documents, keyed to memoranda on the points to be explored. The examination on those three days, recorded in a 323-page transcript, explored critical portions of the case, including the history of dividend decisions in the corporation, and the underlying economic considerations.

On June 27, June 29, and September 18, 1972, plaintiffs took the deposition of Robert Craft, MoPac's chief financial officer. Also in June 1972, plaintiffs examined two defense experts, Pierre Bretey and Isabel Benham. These examinations were led by the Donovan firm with the assistance of Mr. Elsen, who in turn was consulting regularly with Messrs. Haudek and Lowenthal.

During the period of discovery and depositions, a great deal of further litigation activity took place.

Plaintiffs prepared, served, and filed an amendment of the complaints to add a cause of action under Rule 10b-5.

In the latter part of 1971, defendants began to serve interrogatories. The interrogatories were answered by all plaintiffs' counsel on February 1, February 23, June 29, July 18, August 30, and September 28, 1972.

At a conference with the Court held on May 19, 1972, the parties furnished a status report to the Court, and a detailed pre-trial schedule was adopted by the parties, with the approval of the Court.

Plaintiffs' counsel worked closely with the experts, both those who had been retained at the outset, and two others later retained: Professor Paul Cherington (transportation) of the Harvard Business School, and a member of the firm of Temple, Barker & Sloane; and Professor David Hawkins of the Harvard Business School (finance and accounting). We also consulted with Professor Victor Brudney of the Harvard Law School, and other experts in the fields of finance and economics.

In the fall of 1972, pre-trial matters were assigned to Magistrate Sol Schreiber, who began to meet regularly with counsel. These conferences, which required careful preparation, advanced the litigation considerably.

A further round of depositions was scheduled for October 1972, but was called off when the settlement negotiations entered a critical stage.

As noted, these negotiations had been proceeding more or less continuously for about a year. During the early stages, when the three corporate parties were negotiating with one another, the Donovan firm maintained close consultation with Messrs. Pomerantz and Elsen. At an important juncture, Messrs. Pomerantz, Elsen, and a member of the Donovan firm joined the negotiations in St. Louis. This was followed by extensive further correspondence, telephone calls, and conferences among all counsel.

In July 1972, shortly after extensive depositions of Messrs. Jenks and Craft, defendants raised their settlement offer by about one-third.

In the fall of 1972, after further depositions of Messrs. Jenks and Craft, and practically on the eve of trial,

defendants again raised their offer, this time to the level ultimately approved by the Court.

The settlement was announced in the Wall Street
Journal on October 16, 1972. The period between October 16
and December 18 involved extensive work in determining and
drafting the final form of the settlement agreement and
stipulation of settlement. In this connection, and in order
to protect the tax interests of the independent (minority)
Class B stockholders, we retained the firm of Roberts & Holland
as tax counsel. This Court expressly referred to "the opinion
of independent tax counsel retained especially by the Class B
representatives other than Alleghany" (59 F.R.D. at 372).

During this period and in the following weeks leading up to the settlement hearing, we were called upon to study and answer numerous inquiries from Class B stockholders throughout the country. In addition, we reviewed proxy material for the MoPac stockholders' meeting on stockholder approval of the settlement.

The Court will recall the papers prepared for the hearing on January 25, 1973, and the arguments in support of the settlement by Messrs. Pomerantz and Elsen, as well as by the Donovan firm and defense counsel.

The opposition to the settlement from various objectors required intensive study on our part, and the submission of additional data and briefs to the Court.

This Court approved the settlement by its decision of March 19, 1973, and its order and judgment of May 2, 1973.

One objector, William R. Wesson, appealed. Messrs.

Elsen and Haudek participated in preparing the joint appeal

brief for the proponents of the settlement. Judge Peck and

Mr. Elsen argued the appeal for the proponents. On June 12, 1973, the Court of Appeals affirmed, on the opinion of this Court.

Thereafter, Mr. Wesson petitioned for certiorari.

Mr. Haudek participated in preparing the opposing brief for
the proponents. The Supreme Court denied certiorari.

In the meantime, another Class B stockholder, Michael Moumousis, moved to reopen the judgment of this Court. Mr. Haudek, together with a member of the Donovan firm, argued in opposition. This Court denied the application.

While these proceedings were pending, MoPac's stock-holders, including a substantial majority of the independent Class B shareholders (other than Alleghany), overwhelmingly approved the settlement. The ICC likewise approved. On January 21, 1974, the settlement was consummated.

X. TIME SPENT

In stockholder litigation conducted on a contingent fee basis, the benefit achieved is the principal factor bearing on the award of counsel fees (see the accompanying brief). It has, therefore, not been the practice of the Pomerantz firm to keep time records in such litigations. However, the Pomerantz firm was able to reconstruct the time it spent on the litigation by reviewing its files and comparing its records with those of Mr. Elsen's firm and of Mr. Lowenthal. The annexed Exhibits B, C, and D show that Mr. Pomerantz and Mr. Haudek, senior partners of the firm, spent an aggregate of 3,388-3/4 hours on this litigation.

Mr. Elsen's and Mr. Brandwen's firms did keep time records. So did Mr. Lowenthal, although such records are only partial after the voting rights litigation. Accordingly, Mr. Lowenthal supplemented his records by reconstruction based upon his files and the records of the Elsen firm.

The time spent by the Elsen firm is set forth in Exhibit E. It shows 812-1/2 hours for Mr. Elsen, 367-3/4 hours for Mr. Shapiro, and a total of 1228-1/2 hours for the firm.

The time spent by Mr. Lowenthal and his associates appears from Exhibits F, G, and H. The schedules show 4022-1/2 hours spent by Mr. Lowenthal, 989 hours by Mr. Brandwen, 1412-1/2 hours by Mr. Brandwen's partners and associates, and 42 hours by Sherin & Lodgen, for a total of 6466 hours.

Applicants thus submit a total time expenditure of 11,083-1/4 hours, of which by far the major part is the time of senior attorneys. Given the prevailing rates for the time of senior attorneys on a non-contingent basis, which now run from approximately \$100 to \$250 per hour, and applying an appropriate multiplier for the high contingency risk involved, the agreed-on fee is amply supported by the time expended.

XI. THE AGREEMENT ON FEES

Under the terms of the Settlement Agreement (§ 7.10) and the Settlement Stipulation (§ 8), MoPac and Mississippi agreed to pay applicants' fees and expenses to be awarded by the Court. This provision, relieving the Class B of bearing the costs of the litigation conducted on its behalf, is a significant benefit to the class.

with the amount of the fee allowance now a matter between plaintiffs' counsel and the corporate defendants, these parties recently reached an agreement: Applicants would limit the amount applied for to \$2,000,000 (plus disbursements estimated to be not more than \$30,000), and the corporate defendants would not oppose an allowance in those amounts.

This agreement came about as follows:

After the settlement terms had been agreed on, counsel for the parties considered the advisability and propriety of trying to agree on the amount of the fee, and we so advised the Court (letter of December 15, 1972). Counsel thereafter held discussions in an effort to reach such an agreement, but without avail, as we advised the Court (letter of December 22, 1972).

Thereupon, we stated in the settlement notice pursuant to Civil Rule 11B that we intended to apply for fees and expenses of \$6,953,000. We computed this figure as representing ten percent of the benefit to the class, minus the non-contingent fees paid by Alleghany to its counsel (on an approximate basis), and including about \$25,000 in expenses.

Counsel for MoPac and Mississippi indicated that they would oppose an application for such an allowance.

After this Court's approval of the settlement was affirmed on appeal, discussions among counsel concerning fees were resumed. Counsel on both sides thought that they should make every effort to reach agreement on fees, because, if the application were opposed, the ensuing litigation would consume substantial amounts of time and effort, both of the parties and of the Court, aggravated by possible appeals.

After strenuous efforts, the parties finally reached the agreement described above. As discussed in our brief, this agreement should be entitled to great weight in fixing applicants' allowance, since it reflects an arms' length bargain among the interested parties, including the boards of directors of the two defendant corporations that will pay the allowance.

XII. DISBURSEMENTS

The disbursements reasonably and necessarily incurred by applicants are set forth in Exhibits I, J, and K. They aggregate \$22,422.06.

CONCLUSION

We respectfully petition the Court to allow the undisputed fee of \$2,000,000 plus disbursements of \$22,422.06

sheldenH. "v.

Abraham L. Pomerantz

Sworn to before me this

6th day of MARCH , 1974.

MARGARET C. HISLOP
Notary Public, State of New York
No. 03-5914500
Qualified in Bronk County
Commission Express Later, 36, 1974

Sworn to before me this

6th day of March , 1974.

Notary Public, 1602 of 1807 No. 1908 Qualified in start You Congress Marc. 19, 1974

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	UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK 3-26-24 3-26-24	-
1	UNITED STATES DISTRICT COURT 24-24	
2	SOUTHER! DISTRICT OF NEW YORK	
3		
4	SOUTHERN DISTRICT OF NEW YORK To proceedings EFTTY LEVIN, et al., This Late	
5	Plaintiffs, :	
6	vs. : 67 Civ. 5905	
.7	MISSISSIPPI RIVER CORP., et al.,	
8	Defendants. :	
9	:x	-
10		-
11	Before:	Mary Constitution of the Parket
12	HOH. EDWARD WEINFELD,	
13	District Judge.	presentation party
		(HOTESTREEN BOA
14	New York, March 26, 1974,	Name and Persons
15	2:15 p.m.	Account of the Control of the Contro
16		Secretarion services
17	APPEARANCES:	Okademini mining
18	ABRAHAM POMERANTZ, ESQ.,	Martin Martin
19	WILLIAM HAUDER, ESQ., SHELDON ELSEN, ESQ.,	•
	Attorneys for plaintiffs	
20	DONONAN TELETIBE WELLOOF & TENTAN ECOC.	
21	DONOVAN LEISURE NEWTON & IRVINE, ESOS., Attorneys for Alleghany Corp.,	4
22	M. Lauck Walton, Esq., of Counsel	
00	SULLIVAN & CROIMELL, ESOS.,	
23	Attorneys for Missouri Pacific Pailroad;	
24	Michael Maney, Esq., of Counsel	1
05		

GERARD M. CAREY, ESQ.,

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Attorney for objectant Napoleon C. Cabriel

4

Objectants Pro Se:

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Mr. John Charles Viani. 1313 River Ave.

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Point Pleasant, New Jersey

7

Mr. Wichester Fitch Ingersoll, Jr.

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381 Broadway Cambridge, Massachusetts

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Mr. William R. Wesson

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1550 Ocean Avenue Mantoloking, New Jersey.

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WR. CAREY: If it please the court, I would like to make a request to have minutes of my argument made at the request of my client. My name is Gerard M. Carey.

THE COURT: They will be made only if you agree to pay for them.

MR. CAREY: Yes, yes.

THE COURT: All right.

MR. CARMY: At the request of the client.

My name, your Monor, is Gerard M. Carey, and I am appearing here today for Mapoleon C. Gabriel, the owner of five shares of class B stock of Missouri Pacific

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New York.

2 (Motion argued, 3:00 p.m. to 4:30 p.m.) 3 JOHN E. TOBIN, called as a witness by defendant Alleghany Corp., being first duly 5 sworn, testified as follows: 6 MR. ELSEN: Your Honor, before we continue, 7 if we come to 5:30 and the hearing has not been concluded 8 I would like a minute to address your Honor because I am 9 presently in the middle of a trial, and I received this 10 afternoon off for this purpose. THE COURT: I can't. My time schedule 11 12 is such that if I don't go forward tomorrow this will 13 have to go over for a week or 10 days. 14 MR. ELSEN: I don't want to do that. 15 THE COURT: In fact, we won't sit until 16 5:30. I have lawyers coming in upstairs on a matter. 17 I have put that over for a little while. I have an 18 engagement tonight. 19 DIRECT EXAMINATION 20 BY MR. WALTON: 21 Mr. Tobin, would you state your position? 22 I am a member of the New York bar and of this 23 court. I am a partner of the law firm of Donovan 24 Leisure Newton & Irvine at 30 Rockefeller Plaza, New York,

basis until the time of the settlement.

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lar individuals. That was the basis on which fees

were computed and billed to this client on a monthly

O. What knowledge do you have of the expertise paid by Alleghany in this case and fees to other lawyers?

A I am informed as to the amounts. I know the individuals or firms involved, and with the assistance of others in my firm I reviewed those bills before they were submitted to the client for payment with our approval.

O What papers did you bring with you in connection with the fees of Donovan Leisure Newton & Irvine as charged to Alleghany Corporation?

also brought our time records which are individual slips of paper recorded each day by each lawyer of the amount of time he spent on the case and what he did.

I also brought with us our underlying billing data, which we call charge memoranda, which are summaries by individuals of the hours they spent on the matter during the month for which the memorandum is prepared, and which also contain a listing of the disbursements incurred by the firm and charged to this case.

All of those I have with us here today.

MR. WALTON: I have no further questions.

I tender the witness for cross examination or further direct.

THE COURT: Does anybody desire to cross

1	mba Tobin-cross 15
2	examine the witness?
3	MR. VIANI: Your Honor, may I ask the
4	lawyer a question?
5	CROSS EXAMINATION
6	BY MR. VIANI:
7	O At the onset of this action when Alleghany
8	got involved with this recapitalization plan, were you
9	cognizant of the fact of the nonmutuality of interest
10	with the other stockholders?
11	A No, sir.
12	O You were not?
13	A I was not then and I am not now.
14	MR. VIANI: That was my main question,
15	Judge.
16	THE COURT: If there are no other ques-
17	tions of the witness you are excused.
18	HR. WALTON: Thank you, your Honor.
19	(Witness excused.)
20	SHELDON H. ELSEN, called as a wit-
21	ness by plaintiffs, being first duly sworn, testi-
22	fied as follows:
23	DIRECT EXAMINATION
24	BY IIR. POHERAHTZ:
25	O Mr. Elsen, you are one of the attorneys for

Mrs. Levin?

A I am.

O And you operate as co-counsel for the class of B shareholders?

Elsen-direct

- A I did pursuant to order of the court.
- O To avoid repetition of matters in your affidavit, let me get right to the point of your compensation request. Did you and do you keep time records of time devoted to particular causes inyour office?
 - A I do, and my firm does.
- O Did you and your firm do so with regard to your work on this case?
 - A We did.
- O Would you give the court some summary view of how you keep your records in the regular course of your practice of the law?
- of activity devoted to various matters, and then usually not less than once a week we translate these running entries into entries which are put on various separate slips of paper for particular matters which are then broken down by secretaries and other clerical people in our office and are posted to accounts for particular matters.

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O I take it that these records were not reconstructions as his Honor and I have used that word in a colloquy, but actual time records?

A Yes, I believe that our practice is similar to that followed by Mr. Tobin's firm.

- O They are contemporaneously kept and recorded?
- A . They are.

Are the hours referred to in your affidavit of the time devoted by you and your associates to this matter accurate, to the best of your belief?

They are. There may be -- there may have been occasions when we did not record all the time because this, indeed, was a contingency and we may not have been quite as concerned as we might in a matter where the relation with the client was specified in terms of time, but with that one qualification, wes, I think that they were kept with a reasonable degree of meticulousness.

And the hours reported in your affidavit were taken off your regular entries and records made in the regular course of the practice of your profession?

A They were.

O Perhaps this is unnecessary but do you reaffirm all the statements made in your affidavit as if

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O Were you aware during these proceedings that Alleghany Corporation was in violation of Section 54 of the Interstate Commerce Act?

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MR. WALTON: I object to the cuestion.

THE COURT: Objection sustained. We are concerned here only with the issue of fees. I will allow you to question him with respect to that subject matter and cross examine him. We are not retrying the case that has been disposed of.

MR. WESSON: I think it would be useful to to the court at this juncture to produce a current list of the class B stockholders.

THE COURT: For what purpose?

MP. VESSON: I think they -- I think frankly they should have been notified of this hearing.

notice originally of the offer of settlement and also, as I recall it, that the attorneys had requested fees, one in the instance of Alleghany in the sum of \$350,000, and in the instance of Mr. Elsen and Mr. Pomerantz' firm and associated attorneys in something short of \$7 million, and there was indication that in the event of consummation the plan would have further hearing, and notice was given, as I understand it, to the parties who appeared. If you were a party who did appear, you had notice.

If you want to cross examine the witness on

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2	that subject of fees you may. Otherwise, we will
3	terminate. I am not going back into the merits of the
4	original matter.
5	MR. WESSON: I don't really feel that
6	the remaining class B stockholders should be
7	THE COURT: Will you please put your
8	questions, if you have any, to the witness?
9	MR. WESSON: Thank you, sir.
10	THE COURT: Any other person want to ques-
11	tion the witness?
12	(Witness excused.)
13	THE COURT: Any other person want to be
14	heard?
15	MR. POMERANTZ: May we have just a moment,
16	your Honor?
17	(Pause.)
18	WILLIAM E. HAUDEK, called
19	as a witness by plaintiffs, being first duly sworn,
20	testified as follows:
21	DIRECT EXAMINATION
22	BY MR. POMERANTZ:
23	O Mr. Haudel, you are a member of Pomerantz,
24	Levy, Haudek & Block?

I am.

1	mba Haudek-direct 21
2	O And a partner?
3	A Right.
4	O You are actively engaged in connection with
5	the prosecution of these actions both in this court
6	and antecedent litigation in Missouri?
7	A Right.
. 8	O I am not going to ask you to go over the
9	affidavit except to ask you, do you affirm that all the
10	statements in the affidavit ascribed to your and my
11	law firm are true and correct in accordance with the best
12	of your recollection and belief?
13	A That's right, I do.
14	O Those statements, Mr. Haudek, include re-
15	constructions of time spent on both the Missouri case and
16	this case, and let me first ask, has our firm ever kept
17	time records?
18	A Not to my recollection. Very recently I
19	have done it in occasional instances, but that would be
20	within the very last few months.
21	Q Would you state to the court in a general way
22	or as specifically as you wish how you went about re-
23	constructing the time which is included in the affidavit
24	for fees before his Honor?
25	A So far as the so-called voting rights litiga-

tion in Missouri is concerned, I consulted our fee application that was made at the time in the Eastern District of Missouri, and I translated the number of hours that was stated in that application into the present affidavit that you signed.

I also went back over the old litigation papers from the Missouri case and confirmed what I knew in any event since I had prepared the earlier papers, that they were correctly estimated.

So far as the present litigation is concerned,
I used various sources to reconstruct our figures. In
the first place I went through our entire files considering
each separate method such as preparation of the complaint,
one motion or another, depositions, discoveries, I looked
at my notes, contemporaneous writings, used my memory to
indicate to me how much time was spent on various matters,
and since there was usually a range of possibilities so
far as my memory went, I used conservative -- tried to
be consdevative and tried to use the smaller number of
hours rather than the possible larger number of hours.

In addition, I conferred extensively with

Mr. Elsen, who has kept time records of the dividend

litigation. I went with him over his time records, for

instance, and more particularly in connection with

conferences that were kept. Mr. Elsen's memoranda indicated such conferences as were held with either Mr.

Pomerantz or myself, and I singled out those conferences that referred to either Mr. Pomerantz or myself and added up the numbers of hours or fractions of hours.

For that reason in the reconstruction of hours, the time set forth for conferences is not a round figure but a figure giving fractions of hours.

I also compared my memory of the proceedings in the case with the memory of Mr. Elsen, and checked my estimate or reconstruction of the hours with his recollection of what happened. I think this is essentially what came out in what was guite a time-consuming process of reconstructing the hours expended.

- Mr. Haudek, who in our firm attended to the labors of the litigation both in Missouri and here in New York?
 - A You, Mr. Pomerantz, and myself.
 - O No one else?
- There was occasional assistance from associates but our records do not reflect what hours were used by them, and I had no means of reconstructing the hours of assistants, and so I omitted those.

I should probably supplement my previous

mba Haudek-direct statement to say that I also discussed the reconstruction of hours extensively with Mr. Pomerantz and we compared our memories, and that reflects the number of hours worked by Mr. Pomerantz and myself as shown in our computation. MP. POMERANTZ: That is all the direct. THE COURT: Anybody desire to cross examine the vitness. CROSS EXAMINATION BY MR. WESSON: settlement?

O Mr. Haudek, was Mr. LeVasseur happy with the

A Mr. LeVasseur had at first misgivings and finally he agreed. I don't know that, incidentally, of my own information -- of my own knowledge, but it is something that he had discussed with Mr. Pomerantz and that Mr. Pomerantz mentioned to me.

O Has Mr. LeVasseur tendered his stock for the new common?

- I couldn't tell you. A
- 0 B stock?
- I notified him that the time had arrived. I do not know whether he has.
 - These fees that are to be set, I understand,

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after this thing becomes final, has this recapitalization plan become administratively final as far as all of the government agencies are concerned?

A As far as I know, the settlement has been consummated the latter part of January of this year.

O I understand that it is not administratively final as far as the Interstate Commerce Commission is concerned.

A Well, I understand that an action for review of the ICC decision may be pending. I think there is also pending --

TR. WALTON: Excuse me, your Monor, I am the only person here who is a party to that, and we were admitted or permitted to intervene, Alleghany Corporation, with myself as counsel. We have been served with no action to review that proceeding, and so far as I know, it is administratively final. We have received various threats from the objectants from time to time to do various things, but so far I have not been served.

MR. WESSON: I am interested in threats.

I don't know of any threats.

MR. POMERANTZ: May I suggest "r. Wesson ask questions instead of making statements.

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2 BY MR. WESSON:

O If the matter is not administratively final with the government agencies, is it proper to have these proceedings here?

Haudek-cross

MR. POMERANTZ: I object to the question.

THE COURT: I will let him answer.

You may answer.

A In my opinion, my recollection is that under the terms of the settlement agreements the right to apply for an allowance arrives as soon as a decision of the court becomes final.

- O I see. Thank you.
- THE COURT: Did I see somebody raise their hand? Does another objectant want to question the witness?

MR. VIANI: Well, your Honor, I just take exception to one statement made by Mr. Walton. If it comes from the few people who are trying to defend themselves there is no ghreat.

THE COURT: I think Mr. Walton will modify
his statement to way that statements were made from time
to time by stockholders that they contemplated a review
of the administrative proceeding. Would you accept

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1	mba Haudek-cross 27				
2	that amendment, Mr. Walton?				
3	MR. WALTON: Yes, and various other legal				
4	actions.				
5	THE COURT: And other legal actions.				
6	If there are no other questions the witness				
7	is excused.				
8	(Witness excused.)				
9	THE COURT: Any other witnesses?				
10	MR. ELSEN: I call John Lowenthal, your				
11	Honor.				
12	JOHU LOWENTHAL, called as a witness				
13	by plaintiffs, being first duly sworn, testified as				
14	follows:				
15	DIRECT EXAMINATION				
16	BY MR. ELSEN:				
17	O Mr. Lowenthal, would you tell us your present				
18	occupation?				
19	A Professor of law at Rutgers Law School.				
20	O You were an active lawyer in active practice				
21	in New York City before that, were you not?				
22	A Yes, and I still am.				
23	O You still are. When did you become a				
24	professor at Rutgers Law School?				
25	A Part time in 1964 and full time in either				

1	mba Haudek-cross 28					
2	1965 or 1966.					
3	O Have you read the moving papers submitted by					
4	plaintiffs Levin and LeVasseur in this action?					
5	A I have.					
6	Are they, to the best of your knowkedge,					
7	true and accurate?					
. 8	A They are.					
9	THE COURT: Does any objectant desire to					
10	cross examine Mr. Lowenthal or Professor Lowenthal?					
11	THE WITNESS: I prefer "Mr."					
12	MR. VIANI: I would like to have in the record					
13	the fact that I haven't seen all the material so I couldn't					
14	state that I know all the facts of what he is presenting.					
15	THE COURT: They have been on file.					
16	MR. VIANI: Your Honor, I am just a stock-					
17	holder.					
18	THE COURT: All right. If not, you are					
19	excused.					
20	(Witness excused.)					
21	THE COURT: Any other vitness to be offered					
22	on either side? If not, the hearing is closed. Are					
23	all the papers submitted?					
24	MR. POMERANTZ: Yes, your Honor.					
25	THE COURT: All right. Decision reserved.					

Good night, gentleren.

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C. Electronic Surveillance

Alter, supra, requires that the government response to a prima facie showing of illegal electronic surveillance by a witness or his counsel be "factual, unambiguous, and unequivocal."

[17] The affidavits submitted by the government state that the agencies inquired of were the only governmental agencies that could have been involved in electronic surveillance, reveal the dates of claimed surveillance to which the inquiries were addressed, and identify the persons with whom the U.S. Attorney communicated in making the inquiries. In short, the government has squarely denied the charges of illegal electronic surveillance with respect to Mr. Weir and his counsel. Therefore, 18 U.S.C. § 2515 provides Mr. Weir with no haven from the imposition of contempt.

D. Miscellaneous

Finally, Mr. Weir argues that his testimony is unnecessary and that civil contempt is too severe a sanction since he will never respond to grand jury questioning.

[18] The U.S. Attorney has informed this court that Mr. Weir's testimony is necessary and this court is not empowered to review the U.S. Attorney's judgment that the testimony of the witness is necessary to the public interest. Ullmann v. United States, 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511 (1956); In re Kilgo, 484 F.2d 1215 (4th Cir. 1973).

[19, 20] While civil contempt is a drastic remedy, "it is essential that courts be able to compel the appearance and testimony of witnesses." Shillitani v. United States, 384 U.S. 364, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966). Mr. Weir has failed to demonstrate any compelling interest in remaining silent. While informing against ones friends is not normally admired in our society, our criminal system would collapse without the court's power to make with and fully testify.

IV. CONCLUSION

For the above stated reasons, this court, after holding an uninhibited adversary hearing, adjudges Mr. Weir in civil contempt and commits him to the custody of the Marshal until such time as he purges himself by testifying before the grand jury.



Betty LEVIN et al., Plaintiffs.

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MISSISSIPPI RIVER CORPORATION et al., Defendants. No. 67 Civil 5095.

> United States District Court, S. D. New York. June 26, 1974.

Proceedings on applications for allowance of attorneys' fees in class action between Class A and Class B stockholders of railroad. The District Court, Edward Weinfeld, J., held that award of \$850,000 would be made to one group of attorneys and award of \$1,750,000 would be made to another group of attorneys.

Order accordingly.

1. Federal Civil Procedure \$2737

In determining amount to be awarded attorneys who successfully prosecute class action, court is required to give due consideration to all relevant and significant factors, and award sum that is neither excessive nor inadequate.

2. Federal Civil Procedure \$2787.5

Award of \$850,000 to attorneys who, in successfully prosecuting and settling class action between Class A and Class B stockholders of railroad, expended 14,312½ hours of time of senior partners and associates, who billed senior partners' time at \$65 per hour and associates at \$40 per hour, who incurred

Cite as 377 F.Supp. 926 (1974)

approximately \$170,000 in other expenses and who had paying client which it billed for its services was reasonable and would be approved.

3. Federal Civil Procedure =2737.5

Agreement by parties which by terms of settlement of class action between Class A and Class B stockholders of corporation were required to pay any attorneys' fees awarded that fees were reasonable had some bearing but did not relieve court of its duty to make independent appraisal.

4. Federal Civil Procedure \$2737.5

Where attorneys who represented minority Class B stockholders in prosecution and settlement of class action between Class A and Class B stockholders of railroad operated on wholly contingent fee arrangement, expended 110,083½ hours, mostly of senior attorneys' time, and obtained favorable settlement, and parties obligated to pay fees agreed that fee of \$2,000,000 would be acceptable, court would award \$1,750,000.

Orans, Elsen & Polstein, New York City, for plaintiff Betty Levin; Sheldon H. Elsen, John Lowenthal, New York City, of counsel.

Pomerantz Levy Haudek & Block. New York City, for plaintiff Robert LeVasseur: Abraham L. Pomerantz, William E. Haudek; New York City, of counsel.

Donovan, Leisure, Newton & Irvine, New York City, for plaintiff Alleghany Corp.; John E. Tobin, M. Lauck Walton, Glenn S. Koppel, New York City, of counsel.

Dewey, Ballantine, Bushby, Palmer & Wood, New York City, for defendant Mississippi River Corp.; Everett I. Wil-

Levin v. Mississippi River Corp., 50 F.R.D.
 353 (S.D.N.Y.), aff'd on opinion below subnom. Wesson v. Mississippi River Corp., 486
 F.2d 1398 (2d Cir.), cert. denied, 414 U.S.
 1112, 94 S.Ct. 843, 38 L.Ed.2d 739 (1973).

lis, Robert S. Wolf, Gerald E. Ross, New York City, of counsel.

Sullivan & Cromwell, New York City, for defendants Missouri Pacific Railroad Co., Robert H. Craft, T. C. Davis and Thomas F. Milbank: David W. Peck, Michael M. Maney, Carroll E. Neesenisnn, Marcia B. Paul, New York City, of counsel.

Greenbaum Wolf & Ernst, New York City, for objectors Edward Garfield and Barbara M. Garfield: Edward Garfield, New York City, of counsel.

Michael Paul Cohen, Chicago, Ill., William Heimowitz, New York City, for objectors Jacob R. Cohen and June Cohen.

John Charles Viani, Point Pleasant, N. J., Winchester F. Ingersoll, Jr., Cambridge, Mass., William R. Wesson, Mantoloking, N. J., objectors pro se.

OPINION

EDWARD WEINFELD, District Judge.

This is the final stage in the settlement of these consolidated class actions; hopefully, the closing chapter in the controversy and litigations in which the Class A and Class B shareholders of the Missouri Pacific Railroad Company ("MoPac") have been embroiled for almost two decades. Familiarity is assumed with this court's opinion approving the terms of the settlement,1 as well as with the related litigation which established the voting rights of the Class B stock.2 The notices sent to stockholders of the hearing upon terms of the proposed settlement also set forth the applications by attorneys for allowances and that their consideration would be deferred until after entry of final judgment. The settlement pursuant to the final judgment has been fully consummated. The matter now before the

Slayton v. Missouri Pac. R. R., 233 F.Supp. 747 (E.D.Mo.1964), rev'd sub nom. Mississippi River Fuel Corp. v. Slayton, 350 F.2d 106 (8th Cir. 1966), rev'd sub nom. Levin v. Mississippi River Fuel Corp., 386 U.S. 162, 127, 17 L.Ed.2d 834 (1967).

court is the application of plaintiff Alleghany Corporation for reimbursement of fees paid by it for legal, expert and consultant services; also, the application of attorneys for plaintiffs Levin and Le-Vasseur for allowances for their services, plus disbursements. Under the terms of the settlement the allowances awarded by the court are to be paid equally by defendants Mississippi River Corporation ("Mississippi") and MoPac.

The notice to stockholders stated that Alleghany's request for reimbursement in the sum of \$850,000 would not be opposed by MoPac and Mississippi; it also stated that the Levin-LeVasseur, attorneys' application for an allowance in the sum of \$6,953,000 would be opposed by MoPac and Mississippi. After the affirmance of the judgment authorizing the settlement and following approval by the stockholders and by the Interstate Commerce Commission, the interested parties, in a desire to avoid litigation on the fee issue, raached an agreement whereby the Levin and LeVasseur attorneys limited their application for fees to plus disbursements \$2,000,000, \$22,422.06, which Mississippi and MoPac would not oppose.

[1] Upon the return date of the hearing of these applications, five shareholders objected to the payment of the fees as requested, but generally their views reflected continuing objection to the settlement. Two of them, owners of Class A stock, opposed payment of fees by MoPac on the ground that only the Class B stockholders or other allied interests should be assessed the costs of the litigation. The court finds that the objections raised are without substance. The settlement, as this court noted in approving it, was of substantial value to the B stockholders; it was also of substantial value to the corporation and necessarily all its stockholders in ending the costly litigation which, had it gone to trial, whatever its outcome, would not have ended the The general factors to be considered in awarding fees in litigation of this type have recently been specified by our Court of Appeals in City of Detroit v. Grinnell Corp.,³ and need not be enumerated in detail. Although that was an antitrust suit, the same general standards may be applied. While they serve as guides, no precise or mathematical formula is mandated; what is required is that, giving due consideration to all relevant and significant factors, the court award a sum that is fair and reasonable—one that is neither excessive nor inadequate.⁴

A preliminary word is in order. The applicants, in stressing the value of their services in terms of benefit to the Class B shareholders, refer to the \$850-16 share package of new common stock for each share of old Class B stock as a conversion rate of \$2,450, reflecting a gross settlement of \$97,340,950 for all 39,731 shares of the old Class B stock. Thus, Alleghany, applying the \$2,450 per Class B share exchange factor, notes that the average highest annual bid price for Class B shares for the period from 1965 to 1971, following the Supreme Court's ruling in the voting rights case, was approximately \$1,778. Based upon the 39,731 Class B shares outstanding on December 31, 1971, Alleghany argues that this amounts to an aggregate increase in the value of the Class B stock of at least \$26,699,232. and stresses that its requested allowance

strife between the two classes, with continuing diversion of MoPac's officers from their essential duties in operating the railroad and advancing its other economic interests. MoPac's commitment to pay one-half the allowed fees may be considered an additional cash payment to the Class B shareholders as part of the settlement, so that what they received is on a net basis. Accordingly, the sole issue that remains is what is a fair and reasonable allowance for the services by the respective applicants.

 ⁴⁹⁵ F.2d 448 (Mar. 13, 1974); see Lindy Bros. Builders v. American R. & S
 Corp., 487 F.2d 161 (3d Cir. 1973).

Cf. Alpine Pharmacy, Inc. v. Chas. Pfizer 481 F.2d 1045 (2d Cir. 1973).

Cite as 377 F.Supp. 926 (1974)

of \$850,000 is about 3% of the aggregate increase in the value of the Class B stock. The Levin-LeVasseur attorneys, using the same exchange factor of \$2,450, take the market value of the Class B stock after the Eighth Circuit Court of Appeals ruling (rejecting class voting rights) and just prior to the Supreme Court's granting of certiorari, \$530 per share, and compute the net benefit to the Class B shareholders at \$76,283,520. This conceptual theory of benefit somewhat overstates the matter. The Class B shareholders received for their shares what the court deemed a fair and reasonable equivalent on a compromise basis to put an end to continuing controversy between them and the Class A stockholders—a settlement that offered "a permanent solution to the longstanding impasse." 5 This was no recovery of a cash fund or securities which gave the shareholders something of value they did not already own. They were exchanging stock already in hand for other stock of a different class plus cash on a basis deemed to be fair and reasonable in the light of the respective rights of the two groups of litigants, the strength and weaknesses of their respective positions, the probabilities of ultimate success upon a trial, and an evaluation of the terms of the settlement compared with the likely benefits in the event of success upon a trial. However, rejecting the applicants' theory in no respect diminishes the value of their services in achieving a favorable settlement with its consequent and anticipated benefits to the corporation and its stockholders. On the basis of the sixteen shares received by the Class B stockholders, their annual dividends at \$5 per share will be \$80 instead of the \$5 previously declared; also the marketability of the common shares is improved and the settlement is net to each shareholder. Other benefits are set forth in the court's opinion approving the settlement. Indeed, the simple fact is that the settlement achieved more for the Class B stockholders than if they had been suc-

cessful in the litigation, since it at once removed the root cause of their continuing controversy, whereas even success in litigation would not have brought about that result.

The principal thrust of the plaintiffs' claims was directed toward MoPac's restricted dividend policy and the relief sought included the declaration of additional dividends in prior years and increased dividend distribution in the future. The issues raised by the defense required not only legal services of a high order, but the advice and assistance of certified public accountants, investment analysts and railroad economists. The pretrial discovery and preparation for trial involved the study of the complex history of MoPac's reorganization, including analysis of the various ICC opinions relating to the several proposed plans, the voting rights litigation, and relevant accounting principles, and evaluation of volumes of corporate financial data of defendants' and other railroads.

The discovery process, of necessity, was extensive. It encompassed not only depositions of witnesses, but the preparation of meaningful interrogatories and exhaustive inspection and investigation of defendants' files in an effort to obtain documentary support for plaintiffs' contentions, including the allegations of conspiratorial conduct to withhold dividends in order to depress the price of the Class B stock. The importance of dredging up meaningful information to establish the plaintiffs' claims necessarily required the services of senior rather than associate attorneys in the deposition discovery process. The negotiations leading to the settlement, which at times appeared impossible of achievement, were prolonged and were consummated only on the eve of trial when the attorneys were fully prepared, on the basis of their pretrial activities, to proceed to trial. After the settlement was reached, the attorneys expended considerable time in meeting objections to its approval, and after its approval, in seeking to up-

^{5.} Levin v. Mississippi River (
377 F.Supp.—59

hold it in the Court of Appeals and before the ICC, and also thereafter in effectuating its terms.

ALLEGHANY'S APPLICATION

[2] This action was commenced by plaintiff Levin in December 1967. Alleghany intervened by leave of court, as did plaintiff LeVasseur. The action was ordered to be maintained as a class action on behalf of all Class B stockholders. Alleghany was the largest Class B stockholder, owning 53%. This majority position obviously made it more than an average litigant in the protection of its interests. Alleghany's attorneys were Donovan, Leisure, Newton & Irvine, and in all, their fees and expenses and those for the services of other law firms, accountants and financial experts, totalled \$850,000 for which Alleghany seeks reimbursement.

Alleghany's attorneys expended a total of 14,3121/2 hours in the prosecution and settlement of the action, which included those of senior partners and associates billed at rates charged by that firm and others of similar standing, and totalling \$680,234.68. Upon the hearing a senior partner testified that since the onset of the litigations the attorneys had agreed to bill Alleghany at the rate of \$65 per hour for partners' time and \$40 per hour for associates' time, averaging \$47.50 per hour.6 The attorneys' disbursements amounted to \$59,712.20, or a grand total for Alleghany's attorneys' fees and expenses of \$739,946.88, most of which Alleghany has already paid and has agreed to pay the balance. In addition, to assist in the prosecution and settlement of the action, the attorneys retained the services of other law firms, a certified public accountant, and management, transportation and economic consultants, whose charges they certified as

 At the hearing objectants were afforded an opportunity to cross-examine the attorneys who testified as to their services.

7. The application also includes services of other counsel engaged in this and related litigation, which are set forth in the in support of the requested a fair and reasonable, and which totalled \$110,053.12, which Alleghany has paid. Thus, the total paid or owed by Alleghany for all services is \$850,000.

The sum requested, measured by any applicable standard—whether the benefits conferred upon the class, the importance of the litigation to the public, the complexity, magnitude and difficulty of the case, the hours expended by lawyers, their status and standing at the bar or the rates charged—is fair and reasonable, if not on the modest side. Alleghany's application for reimbursement in the sum of \$850,000 is granted.

APPLICATION OF ATTORNEYS FOR LEVIN AND LeVASSEUR

Plaintiffs Levin and LeVasseur were substantial owners of Class B stock. Plaintiff Alleghany, as the majority owner of the Class B stock, had a veto power over corporate action that required the separate approval of the Class B stock; accordingly, independent representation of the minority Class B group was fully justified. In addition to the principal class action claims with respect to MoPac dividend policy, the Levin-LeVasseur group asserted derivative claims on behalf of MoPac. Orans, Elsen & Polstein represented plaintiff Levin, and Pomerantz, Levy, Haudek & Block represented plaintiff LeVasseur, but they cooperated and their application is a joint one.7

[3] While in some measure the activities of the Levin-LeVasseur attorneys and Alleghany's ran a parallel course, in other respects it did not; in any event, the attorneys acted independently in espousing the interests of the Class B minority group. They also represented minority Class B interests in the Missouri action which determined the voting rights of the Class B stock-

Counsel have agreed among themselves as to the allocation of any award, so it is not necessary for the court to make a specific allocation.

See Levin v. Mississippi River Corp., 59
 LD. 353, 367 (S.D.N.Y.1973).

Cite as 377 F.Supp. 926 (1974)

holders. The attorneys request an allowance of \$2,000,000, reduced from their original request of \$6,953,000, as noted above, and \$22,422.06 for disbursements. These applicants urge that since MoPac and Mississippi are obligated to pay any fee award, their agreement not to oppose the reduced application, particularly in view of their opposition to the originally requested amount, affords strong assurance of its reasonableness and accordingly should be given great, if not decisive, weight. However, to accept as conclusive the parties' agreement as to fees in a class or derivative action would mean the surrender of the court's duty and its discretion. The agreement, while it may have some relevance, does not relieve the court of its duty to make an independent appraisal, to "avoid awarding 'windfall fees' and . . . likewise avoid every appearance of having done so," and to award only such fees that are fair, "with an eye to moderation" based upon the applicable standards.

The award is sought for services rendered over a ten-year period in this and the related predecessor actions wherein the voting rights of the Class B stock were defined.10 The effectiveness and skill of the attorneys who espoused the interests of the Class B stockholders are attested to by the settlement itself. They are of considerable experience in class and derivative stockholder litigation, and their expertise was brought to bear in the instant case on behalf of their clients. Because of the magnitude, complexity and importance of the issues, the lawyers who participated in the various aspects of the litigation in the main were senior attorneys. They were opposed by eminent and able attorneys representing the defendants. The pretrial procedures were conducted with conspicuous ability and were of signal importance in achieving the settlement. The services of the Levin-LeVasseur attorneys were rendered on a wholly contingent basis and, unlike the Alleghany attorneys, no payment to date has been made to any of them. The total time expended by these attorneys, principally the seniors, was 11,083½ hours. However, this is but one factor, and in this court's view only of relative importance in the instant case.

Upon the hearing of these applications the court questioned whether the portion of the time and the services rendered in the voting rights action which reached the Supreme Court were compensable in this action. After reflection I am satisfied that they are, since the right of the Class B stock to vote separately was the basis and hard core of this litigation. Indeed, the settlement of this action could only have been achieved because of the successful conclusion of the voting rights suits.11 The effective veto power of the Class B stock obviously was a principal factor in bringing about the settlement. The fact that the attorneys' applications for fees in the Missouri action were not allowed does not foreclose granting allowances for such services. The Eighth Circuit Court of Appeals, which reversed the district court ruling which did grant them fees, acknowledged "[i]t is undisputed that the Class B stockholders obtained a very substantial benefit from the litigation they instituted and won," 12 but noted that "the right of the named plaintiffs and their attorneys to make a pro rata recovery of

City of Detroit v. Grinnell Corp., 495 F.2d
 448, at 469-470 (2d Cir., 1974).

Slayton v. Missouri Pac. R.R., 233 F. Supp. 747 (E.D.Mo.1964), rev'd sub nom. Mississippi River Fuel Corp. v. Slayton, 359 F.2d 106 (8th Cir. 1966), rev'd sub nom. Levin v. Mississippi River Fuel Cor

U.S. 162, 87 S.Ct. 927, 17 L.Ed.2d 834 (1967).

Cf. Angoff v. Goldfine, 270 F.2d 185 (1st Cir. 1959).

Missouri Pac. R.R. v. Slayton, 407 F.2d
 1078, 1081 (8th Cir.), cert. denied, 395 U.S.
 S.Ct. 1998, 23 L.Ed.2d 451 (1969).

fees and expenses against the Class B stockholders . . . is not directly before us in this case," ¹³ and finally that any benefit to MoPac was only incidental to the main litigation which did not create a new fund for the corporation or the preservation of assets so as to warrant an allowance. Thus the request for special services is proper in this action, which may be considered a companion or related one.

[4] It is at once apparent that these attorneys, on the basis of less hours than those expended by Alleghany's attorneys, are seeking a substantially higher allowance. The services of that firm in achieving the settlement were of equal value to those of the Levin-Le-Vasseur group. However, as was pointed out at the hearing, and as is the fact, Alleghany's attorneys had a paying client; they received and would receive payment from their client no matter what the outcome of the litigation. These attorneys, however, faced the prospect of no compensation for almost ten years of extensive and conspicuous services if they did not prevail in this action. The success of the suit, with its thrust directed toward the dividend policy, which centered on the business judgment of directors, obviously could not be foretold-as this court suggested, at best the probability of ultimate success upon a trial could only be one of "cautious prophecy." 14 Taking into account the difficult and complex problems inherent in the litigations, the total results achieved for the class, the benefit to MoPac, the skill and experience of the attorneys, the hours expended by senior and associate attorneys at prevailing rates, the high caliber of opposing counsel, the risk of no compensation or recovery of expenses in the event of nonrecovery, the court deems \$1,750,000 as fair and reasonable. These counsel are also entitled to reimbursement for disbursements in the sum of \$22,422.06.

Judgment may be entered accordingly.

WOODLAWN MEMORIAL PARK OF NASHVILLE, INC.

> L & N RAILROAD CO., INC. Civ. A. No. 5060.

United States District Court, M. D. Tennessee, Nashville Division. March 10, 1972.

Suit for damages allegedly caused by collection and diversion of rainfall on railroad property in such a manner as to cause water to fall into and unto adjacent cemetery property in greater quantities and at a place other than normal drainage shed. The District Court, Morton, J., held that railroad could not be held liable under the law of Tennessee where change in course of drainage ditch and/or grade in leveling of its property by railroad did not cause flooding of cemetery property on a lower level and any loss suffered by cemetery was caused by the increase in surface water in drainage area south and east of railroad property caused by surrounding commercial and industrial development and inadequacy of cemetery underground drainage system to accommodate the heavy and intense rainfall.

Judgment for defendant.

1. Waters and Water Courses = 119(3)

Generally, under law of Tennessee, owner of higher land has no right, even in course of use and improvement of his land, to collect surface water into a drain or a ditch, increasing it in quantity or in a manner different from natural flow upon lower lands of another, to injury of such lands.

2. Waters and Water Courses \$\iins119(2)\$

If proprietor of higher lands alters natural condition of his property, and collects surface and rainwater together at bottom of his estate and pours it in a

Levin v. Mississippi River Corp., 59 F.R. 353, 366 (S.D.N.Y.1973).

3899-32

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

ENTERE OPERT LEVASSEUR, IN OFFICE DOCKET

67 Civ. 5095 (EW)

-against-

JUDGMENT # 14,56/

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT H. KRAFT, T. C. DAVIS and THOMAS F. MILBANK,

Defendants.

Plaintiff Alleghany Corporation and the attorneys for plaintiffs Betty Levin and Robert LeVasseur, to wit, Messrs. Orans, Elsen & Polstein and Messrs. Pomerantz Levy Haudek & Block, have applied for the allowance of the fees and expenses in this action.

A hearing on the application was held on March 26, 1974, and the Court has rendered its decision dated and filed June 26, 1974. It is

ORDERED, ADJUDGED AND DECREED that the defendants Mississippi River Corporation and Missouri Pacific Railroad Company pay the sum of \$350,000 for legal fees and disbursements to plaintiff Alleghany Corporation, to be paid in equal parts by such corporations; and it is further

CRDERED, ADJUDGED AND DECREED that the defendants Mississippi River Corporation and Missouri Pacific Railroad Company pay the sum of \$1,750,000 as legal fees and the further

7-3-74

sum of \$22,422.06 as disbursements, for a total of \$1,772,422.06, jointly to Messrs. Orans, Elsen & Polstein and Pomerantz Levy Haudek & Block, to be paid in equal parts by such corporations.

Dated: New York, New York , 1974.

Paymond 7. Burghast
CHERK

ENTERED IN OFFICE ONITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

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BETTY LEVIN, ALLEGHANY CORPORATION and ROBERT LE VASSEUR,

Plaintiffs,

-against-

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT, T.C. DAVIS and THOMAS MILBANK,

67 Civ. 5095

NOTICE OF SETTLEMENT OF ORDER

Defendants .:

SIRS:

PLEASE TAKE NOTICE that an order, a true copy of which is annexed hereto, will be presented for settlement and signature by the Honorable Frederick van Pelt Bryan at the Office of the Clerk, in Room 601 of the United States Courthouse, Foley Square, New York, New York, on October 14, 1968 at 10:00 A.M. New York, New York October 9, 1968

Yours, etc.,

ORANS ELSEN & POLSTEIN Attorneys for Plaintiff Betty Levin Office & P.O. Address 10 East 40th Street New York, N.Y. 10016

DONOVAN LEISURE NEWTON & IRVINE Attorneys for Plaintiff Alleghany Corporation Office & P.O. Address 2 Wall Street New York, N.Y. 10005

TO: SULLIVAN & CROMWELL, ESQS. Attorneys for Defendants Missouri Pacific Railroad Company, Robert H. Craft, T.C. Davis and Thomas F. Milbank 48 Wall Street New York, N.Y. 10005

LEON LEIGHTON, ESQ.
6 East 45th Street
New York, N.Y. 10017
and

BRYAN CAVE McPHEETERS & McROBERTS, ESQS. 1600 Boatmen's Bank Bldg. 3140 N. Broadway St. Louis, Missouri 63102

Attorneys for Defendants Mississippi River Corporation

POMERANTZ LEVY HAUDEK & BLOCK Attorneys for Plaintiff Robert LeVasseur 295 Madison Avenue New York, H.Y. 10017

The within Order is consented to and notice of settlement is waived:

By Attorneys for Defendants
Missouri Pacific Railroad
Company, Robert H. Craft,
T. C. Davis and Thomas F.
Milbank

LEON LEIGHTON, ESQ.

Attorney for Defendant Mississippi River Corporation

POMERANTZ LEVY HAUDEK & BLOCK

Attorney for Plaintiff Robert LeVasseur UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BETTY LEVIN, ALLEGHANY CORPORATION and ROBERT LEVASSEUR,

Plaintiffs,

67 Civ. 5095

-against-

MISSISSIPPI RIVER CORPORATION,
MISSOURI PACIFIC RAILROAD COMPANY,
ROBERT H. CRAFT, T. C. DAVIS and
THOMAS MILBANK,

ORDER

Defendants.

Plaintiffs Betty Levin and Alleghany Corporation having moved this Court for an order pursuant to Rule 23(c) and (d), Federal Rules of Civil Procedure, determining that this action may be maintained as a class action and directing that notice be given to the class in such manner as the Court may direct, and said motion having come on to be heard on September 24, 1968,

Now, upon the pleadings on file and the affidavits submitted on said motion, and after hearing Richard L. Bond, Esq., for plaintiff Alleghany Corporation, and Sheldon H. Elsen, Esq., for plaintiff Betty Levin, in support of said motion, and Michael M. Maney, Esq., for defendants Missouri Pacific Railroad Company, Robert H. Craft, T. C. Davis and Thomas Milbank, in opposition to said motion, and due deliberation having been had, and

It appearing from the foregoing papers that there is no dispute that at the present time there are approximately 1,200 holders of Class B Stock of Missouri Pacific Railroad Company, that the plaintiffs presently before the Court are the

owners of a majority of the outstanding Class B stock, and that this action meets the requirements of a class action under Rule 23(a), (b)(1) and (b)(2) of the Federal Rules of Civil Procedure, it is hereby

ORDERED that the motion by plaintiffs Betty Levin and Alleghany Corporation to determine that this action may be maix-tained as a class action be and it hereby is granted; and it is further

ORDERED that this action is determined to be a class action within the provisions of Rule 23(a), (b)(1) and (2), Federal Rules of Civil Procedure, and that the members of said class are all Class B stockholders of Missouri Pacific Railroad Company; and it is further

ORDERED that, pursuant to Rule 23(d), Federal Rules of Civil Procedure, notice of the pendency of this action substantially in the form annexed to this order be mailed to all registered holders, as of October 15, 1968, of Class B stock of the Missouri Pacific Railroad Company; and it is further

ORDERED that, within 10 days of the entry of this order, plaintiffs Betty Levin, Alleghany Corporation and Robert LeVasseur shall deliver to defendant Missouri Pacific Railroad Company a sufficient number of printed notices in envelopes for mailing to each registered holder of Class B stock of the Missouri Pacific Railroad Company, and defendant Missouri Pacific Railroad Company shall cause a copy of said notice to be mailed to each registered holder of Class B stock of the Missouri Pacific Railroad Company, as determined by the stock transfer records of said company, within 5 business days after receipt from

plaintiffs of said printed notices in envelopes; and it is further

ORDERED that the reasonable expenses of said mailing shall be horne jointly and severally by the plaintiffs; and it is further

ORDERED that defendant Missouri Pacific Railroad
Company shall file an affidavit of mailing with the Court
promptly after the aforesaid mailing, which affidavit shall
contain the name and address of each person to whom the notice
was mailed; and it is further

ORDERED that any member of the class desiring to intervene in this action must, no later than December 2, 1968, give notice of intention to intervene in the manner set forth in the appended Notice, and thereafter must, no later than December 20, 1968, either obtain the consent of all parties to said intervention or serve notice of motion for leave to intervene.

Dated: New York, New York October 4, 1968

178

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

BETTY LEVIN,

Plaintiff,

ENTE ALLEGHAY CORPORATION,

67 Civ. 5095 (EW)

IN CHICE COCKET

7-20-72

Plaintiff-Intervenor, : AMENDED SUPPLEMENTAL COMPLAINT OF INTER-VENOR ALLEGHAMY

CORPORATION

ROBERT LeVASSEUR,

Plaintiff-Intervenor, :

(Class Action)

-against-

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT, T. C. DAVIS and THOMAS F. MILBANK,

Defendants.

Plaintiff-intervenor hany Corporation ("Alleghany") by its attorneys, alleges:

- 1. (a) This action was initiated on or about December 29, 1967, by plaintiff Betty Levin, a citizen of the Commonwealth of Massachusetts, on behalf of herself and all other holders of Class B Stock of the Missouri Pacific Railroad Corporation ("MoPac") and on behalf of MoPac.
- (b) Defendant Mississippi River Corporation (formerly known as Mississippi River Fuel Corporation and hereinafter called "Mississippi") is a corporation organized under the

laws of the State of Delaware, with its principal place of business in the State of Missouri.

- (c) Defendant MoPac is a railroad corporation organized under the laws of the State of Missouri, with its principal place of business in the State of Missouri.
- (d) Defendants Robert H. Craft ("Craft"), T. C. Davis ("Davis") and Thomas F. Milbank ("Milbank") are citizens of the State of New York.
- 2. Plaintiff-intervenor Alleghany is a corporation organized under the laws of the State of Maryland. At all times complained of herein, Alleghany has been, and continues to be, the beneficial owner of a majority of the outstanding shares of Class B Common Stock of MoPac. Alleghany presently is the beneficial owner of 21,243 of the 39,731 shares of Class B Common Stock of MoPac outstanding.
- 3. Jurisdiction of the Court is based on diversity of citizenship of the original parties. The amount in controversy is in excess of \$10,000.
- 4. (a) This action is brought by plaintiff derivatively, and by plaintiff and by plaintiff-intervenor on their own behalf and on behalf of all other holders of Class B Stock of MoPac.
- approximately 1200 persons, and joinder of all of them is impracticable. The complaints herein present questions of law and fact common to the entire class, and the claims contained in the complaints are typical of the claims of the class. The intervention as a plaintiff by Alleghany, the beneficial cwner of more than 52% of the outstanding Class B Stock of MoPac,

insures that plaintiffs will fairly and adequately protect the interests of the class.

- (c) The prosecution of separate actions by individual members of the class would create the risks of inconsistent or varying adjudications which would establish incompatible standards of conduct for defendants, and of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members of the class or substantially impair or impede their ability to protect their interests. Defendants have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole.
- (d) The complaints herein raise questions of law and fact common to the members of the class which predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Intervening Plaintiff's First Claim

- 5. At all times complained of herein:
- (a) The capital stock of MoPac consists and has consisted of two classes, A and B.
- (b) There have been outstanding approximately 1,850,000 shares of MoPac Class A stock and 35,731 shares of MoPac Class B stock; as of December 31, 1971, there were outstanding 1,864,052 shares of MoPac Class A Stock and 39,731 shares of MoPac Class B stock.

- (c) In all respects but name, MoPac Class A Stock is and has been a preferred stock.
- (d) MoPac Class A Stock is and has been limited

 (i) in its dividend rights to a preferential noncumulative

 dividend not to exceed \$5 per share in any calendar year, and

 (ii) in its right to share in the assets of MoPac in the event of

 liquidation to an amount not to exceed \$100 per share plus up to

 \$5 in dividends declared but not paid.
- (e) MoPac Class B Stock is and has been the only common stock of MoPac entitled to unlimited participation in the earnings and equity.
- (f) MoPac Class B Stock is and has been entitled to reasonable dividends out of MoPac's net income available for dividends after \$5 per share has been paid on the Class A stock in any calendar year.
- (g) MoPac is and has been permitted to declare and pay dividends without limit as to amount on the Class B Stock out of net income available for dividends, after \$5 per share has been paid on the Class A Stock in any calendar year.
- (h) In the event of MoPac's liquidation, the Class B Stock is and has been entitled to all earnings and assets of MoPac after payment of debts and the limited preferences of the Class A Stock, without further participation by the Class A.
- 6. (a) Pursuant to MoPac's charter, each share of Class A Stock and each share of Class B Stock is entitled to one vote for election of directors of MoPac.
- (b) Pursuant to MoPac's charter, each class is entitled to a class vote on certain subjects (including any proposal to change or alter in any way the preferences, qualifications, limitations, restrictions or special or relative rights

of either class of stock), but is not entitled to a class vote for election of directors.

- (c) At all times since 1962, defendant Mississippi has owned and presently owns in excess of 52% of the outstanding Class A Stock of MoPac, constituting a majority of all the outstanding voting stock of MoPac.
- (d) By virtue of its said ownership since 1962 of a majority of the outstanding voting stock of MoPac, defendant Mississippi since 1962 has had and continues to have the power to elect its nominees to MoPac's Board of Directors.
- (e) At all times since 1962, nominees of defendant Mississippi in fact have been elected to and presently constitute the entire MoPac Board of Directors.
- (f) At all times since 1962, a majority of members of the MoPac Board of Directors also have been and presently are directors and/or officers of defendant Mississippi.
- (g) By virtue of the foregoing, MoPac is and since 1962 has been controlled by Mississippi, which presently is the owner of more than 60% of MoPac's Class A Stock and of approximately 59% of MoPac's total voting stock.
- 7. (a) None of the members of the MoPac Board of Directors owns any MoPac Class B Stock.
- (b) The members of the MoPac Board of Directors in the aggregate owned 9,594 shares of MoPac Class A Stock in 1963 and presently own in excess of 11,000 shares of MoPac Class A Stock.
- (c) At all times complained of herein, defendants Craft, Davis and Milbank have been and presently are directors

of MoPac.

- (d) Defendants Craft and Davis are members of the Executive Committee of the MoPac Board of Directors.
- (e) Defendant Craft is Chairman of the Finance Committee of the MoPac Board of Directors.
- (f) Defendants Craft and Milbank are directors of defendant Mississippi.
- (g) Defendant Craft is Chairman of the Board of Directors of defendant Mississippi.
 - 8. At all times complained of herein and presently:
- (a) The members of the MoPac Board of Directors, including defendants Craft, Davis and Milbank, have had and now have a duty to act in the interests of all shareholders of MoPac.
- (b) Defendant Mississippi has had and now has a duty not to utilize its voting control over the composition of MoPac's Board of Directors in a manner which would cause MoPac's directors not to act in the interest of all MoPac stockholders.
- 9. At the time of MoPac's reorganization, Alleghany was the owner of 48% of the outstanding common stock of MoPac, for which it received Class P Stock pursuant to the plan of reorganization.
- 10. (a) Since MoPac's reorganization in 1955-1956, the net equity allocable to the 39,731 shares of Class B Stock has increased so substantially that it now greatly exceeds the fixed amount to which the preferred Class A Stock is entitled in the event of liquidation.
- (b) In 1956, MoPac (which then published only unconsolidated financial statements), had a net equity of \$224,544,774, of which \$187,195,700, or 83.4%, was allocable to

the then outstanding 1,871,957 shares of Class A Stock, and \$37,349,074, or 16.6%, was allocable to the 40,648 outstanding shares of Class B Stock.

(c) During the period from 1962, when MoPac first published consolidated financial statements, through 1971, the amount of MoPac's net worth, as reported by it to its stock-holders, allocable to the liquidation rights of the Class A Stock has remained constant (except for minor variations due to fluctuations in the number of Class A shares outstanding), while the net worth allocable to the Class B Stock has steadily grown as follows:

	Total Net Worth	Net Worth Allocable to Class Λ	Net Worth Allocable to Class E
1962 -	\$380,178,000	\$184,332,600	\$195,845,400
1963 -	395,894,282	184,957,600	210,936,682
1964 -	414,200,607	185,620,100	228,580,507
1965 -	429,825,000	184,462,500	245,362,500
1966 -	448,766,000	185,297,700	263,468,300
1967 -	471,072,000	185,877,700	285,194,300
1968 -	485,659,000	186,157,700	299,501,300
1969 -	497,937,000	186,335,200	311,601,800
1970 -	510,010,000	186,355,200	323,654,800
1971 -	517,860,000	186,405,200	331,454,800

- (d) At the end of 1962, 48% of MoPac's Net Worth was allocable to the Class A Stock and 52% to the Class B stock, but as a result of the growth in MoPac's net worth, by the end of 1971 only 36% of MoPac's net worth was allocable to the Class A Stock, while 64% was allocable to the Class B Stock.
- 11. (a) At the end of 1971 each share of Class B Stock represented beneficial ownership of over \$8,300 of MoPac's net worth, while each share of Class A Stock represented only \$100.

- (b) On June 30, 1972, MoPac Class A Stock closed at \$70 per share on the New York Stock Exchange.
- (c) On June 30, 1972, MoPac's Class B Stock was quoted over the counter at per share prices of\$1,100 bid, \$1,175 asked.
- (d) Because of the matters complained of herein, the market price of MoPac Class B Stock does not fully reflect the true value thereof.
- 12. (a) Since MoPac's reorganization in 1955-1956, its retained income has increased substantially.
- (b) In 1955, MoPac (which then published only unconsolidated financial reports) reported retained income of \$14,606,049.
- (c) Since 1962, MoPac (which then published and now publishes consolidated financial statements) reported to its shareholders the following retained income at the end of each year:

1962 \$189,871,000 1963 205,308,000 1964 223,318,000 240,136,000 1965 -1966 258,678,000 1967 280,677,000 1968 293,535,000 306,081,000 1969 1970 318,145,000

(d) Since MoPac's retained income is in addition to assets sufficient to satisfy fully all liabilities of MoPac,

1971

325,965,000

including the maximum permissible distribution on Class A Stock in the event of liquidation, all \$325,965,000 of MoPac's retained income at the end of 1967 was allocable to the Class B Stock.

- 13. (a) The growth in the net worth of MoPac since its reorganization in 1955-1956 has been in addition to substantial annual expenses for maintenance of and additions to the rail-road's line, structures and equipment.
- (b) From 1955 through 1971, MoPac has reported to its stockholders that it has made gross capital expenditures of \$876,416,723, an average annual investment of over \$50 million.
- (c) The present condition of MoPac's plant, equipment, lines and facilities is excellent and is superior to most other Class I railroads in the United States.
- 14. (a) MoPac's annual net income after taxes has grown substantially since its reorganization in 1955-1956.
- (b) In 1955, MoPac (which then published only unconsolidated financial statements) reported to its stock-holders net income after taxes of \$14,595,039.
- (c) Since 1962, MoPac (which then published and now publishes consolidated financial statements) reported to its stockholders annual net income after taxes as follows:

1962 \$22,250,000 24,958,000 1963 27,472,000 1964 26,301,000 1965 1966 27,984,000 31,481,000 (including extraordin-1967 ary net income item) (including extraordin-1968 22,359,000 ary net income item) 21,287,000 1969 1970 21,580,000 1971 17,338,000 (including extraordinary net income item)

- 15. (a) In every year since 1956, MoPac's Board of Directors has declared dividends on the Class A Stock.
- (b) During the years 1956 through 1963, the annual dividends declared on MoPac's Class A Stock were less that \$5 per share, and no dividends were paid on the Class B Stock.
- (c) Commencing with 1964, annual dividends in the maximum permissible amount of \$5 per share have been declared on MoPac Class A Stock. The total amounts of these dividends, and their relation to MoPac's after tax net income, are as follows:

Year	Per Share	Total Dividends Paid to Class A as Reported to Stockholders	Percent of Net Income Paid to Class A
1964	\$5.00	\$9,263,000	36%
1965	5.00	9,284, 00	35%
1966	5.00	9,243,000	33%
1967	5.00	9,283,000	29%
1968	5.00	9,302,000	41%
1969	5.00	9,314,000	44%
1970	5.00	9,317,000	43%
1971	5.00	9,319,000	54%

Average percentage of Net Income annually paid in dividends to the Class A 39%

16. Commencing with 1964, the Board of Directors of MoPac has declared annual dividends of \$5 per share on the MoPac Class B Stock. The total amounts of these dividends, and their relation to MoPac's after tax net income, were as follows:

Year	Per Share	Total Dividends Paid to Class as Reported to Stockholders	Percent of Net Income Paid to Class A
1964	\$5.00	\$199,000	0.7%
1965	5.00	199,000	0.8%
1966	5.00°	199,000	0,7%
1967	5.00	199,000	0.6%
1968	5.00	199,000	0.9%
1969	5.00	199,000	0.9%
1970	5.00	199,000	0.9%
1971	5.00	199,000	1.1%

17. (a) During the period 1964 through 1971, the amount of MoPac's net worth allocable to the Class B Stock

consistently has exceeded the amount of net worth allocable to the Class A Stock.

- (b) During the period 1964 through 1971, the amount of dividends declared by the Board of Directors of MoPac on the Class B Stock has totalled \$1,592,000 while the amount of dividends declared on the Class A Stock has totalled \$74,325,000.
- (c) During the period 1964 through 1971, the average percentage of MoPac's net income after taxes declared on the Class B Stock has been 0.8% while the average percentage declared on the Class A Stock has been 39%.
- (d) During the period 1964 through 1971, the MoPac Board of Directors has declared dividends on the Class A Stock which have been more than forty-eight times those declared on the Class B Stock, although during the same period the average interest of the Class A Stock in MoPac's net worth has been 41% and the interest of the Class B Stock more than 59%.
- 18. MoPac must compute "Available Net Income" (hereinafter "ANI") by offsetting certain fixed charges against income available for fixed charges, and must set aside certain portions of ANI for capital expenditures and for mortgage bond sinking funds and, if earned, interest on debt obligations as fully set forth in § 5.02 of Article V of MoPac's General (Income) Mortgage dated January 1, 1955. MoPac's annual net income is available for payment of dividends on its capital stock of both classes to the extent that it exceeds the amounts thus required to be set aside from ANI.
- 19. (a) During the year 1964 (when MoPac first began paying regular annual \$5 dividends on its stock) through 1971

MoPac's net income available for dividends (Figure the deductions referred to in paragraph 18) as reported to its stockholders was:

1964	-	\$14,554,489
1965	-	13,595,346
1966	-	15,291,799
1967	-	27,493,000
1968	-	13,606,000
1969	-	10,892,000
1970	-	13,403,000
1971	_	4,469,000

(b) During the period 1964-1971, MoPac had annual and accumulated ANI after the deductions referred to in paragraph 18 and after payment of maximum permissible dividends on the Class A Stock in the following amounts:

		Annual	Accumulated
1964	-	\$ 5,291,489	\$40,296,000
1965	-	4,312,346	44,409,000
1966	-	6,048,799	50,259,000
1967	-	18,210,000	68,271,000
1968	-	4,304,000	72,533,000
1969	-	1,578,000	73,111,000
1970	-	4,086,000	77,197,000
1971	-	- 0 -	72,531,000

(c) During the period 1964-1971, the annual \$199,000 in dividends declared by the Board of Directors of MoPac on the Class B Stock constituted the following percentages of MoPac's accumulated net income available for payment of dividends on the Class B Stock:

1964 - 0.5%

1965 - 0.4%

1966 - 0.4%

1967 - 0.3%

1968 - 0.3%

1969 - 0.3%

1970 - 0.3%

1971 - 0.3%

Average - 0.35%

- began declaring dividends of \$5 on both the Class A and Class B Stocks in each year which totalled \$9,250,000 on the Class A and \$199,000 on the Class B, MoPac's total retained income on a consolidated basis as reported to the stockholders has risen from \$223 million in 1964 to over \$325 million in 1971, and Pac's unappropriated retained income, on an unconsolidated basis, as reported to the Interstate Commerce Commission, rose from \$71 million in 1964 to \$108 million in 1971.
- 21. Since 1964 when the Board of Directors of MoPac began declaring \$5 in dividends in each year on both the Class A and Class B Stocks, and limiting the Class B to \$199,000 per year while paying approximately \$9,250,000 per year to the Class A Mopac has, at the end of each year, reported to its stockholders in excess of \$97,000,000 in cash, temporary cash investments, special deposits and accounts receivable, on a consolidated basis, as follows:

	Year	Cash	Temporary Cash Investments	Special Deposits	Accounts Receivable	Totals	
-	1964	\$17,937,000	\$53,049,000	\$12,109,000	\$29,637,000	\$112,732,000	
	1965	10,222,000	69,693,000	8,829,000	28,665,000	117,409,000	
	1966	19,194,000	40,074,000	11,744,000	29,275,000	100,287,000	
	1967	27,344,000	30,916,000	9,036,000	38,885,000	106,181,000	
	1968	25,112,000	14,749,000	8,824,000	48,383,000	97,068,000	
	1969	25,410,000	15,641,000	9,831,000	57,760,000	108,642,000	
	1970	19,849,000	32,925,000	9,063,000	51,959,000	113,796,000	
-	1971	23,843,000	42,126,000	8,328,000	51,091,000	125,388,000	

- 22. Since 1964, the Board of Directors of McPac, including defendants Craft, Davis and Milbank, has failed and refused to declare dividends in excess of \$5 per share on the Class B Stock of Mopac and has arbitrarily limited dividends on the Class B stock to the maximum permissible per share dividend payable on the Class A Stock, despite the aforesaid enormous differences in equity and value between the two classes.
- 23. There has been no business justification for the continued failure since 1964 by MoPac's Board of Directors to declare dividends on the Class B Stock beyond the nominal amount of \$199,000 per year.
- 24. The arbitrary failure since 1964 by the Board of Directors of MoPac to pay reasonable dividends to MoPac's Class B stockholders was part of an unlawful scheme by defendant Mississippi, which controls MoPac's Board of Directors, to benefit Mississippi and the other Class A stockholders, including directors of MoPac, at the expense of the Class B stockholders.
- 25. Defendant Mississippi and the Board of Directors of MoPac, including defendants Craft, Davis and Milbank, have breached

their fiduciary duties to MoPac and the Class B stockholders of MoPac.

- 26. The arbitrary failure since 1964 to pay reasonable dividends to MoPac's Class B stockholders will continue unless enjoined.
- 27. Intervening plaintiff has no adequate remedy at law.

Intervening Plaintiff's Second Claim

- 28. Intervening plaintiff repeats and realleges the allegations contained in paragraphs 1 through 27 (including subparagraphs) hereof.
- 29. Commencing in or about 1959, defendant Mississippi began to purchase Class A Stock of MoPac for the purpose of acquiring voting control of MoPac.
- 30. By the end of 1962, defendant Mississippi had acquired a majority of the outstanding shares of MoPac Class A Stock, and since that time it continuously has had and continues to have voting control of MoPac.
- 31. Defendant Mississippi has continued to acquire shares of MoPac Class A Stock and presently owns in excess of 60% of the outstanding Class A Stock of MoPac.
- 32. Defendant Mississippi owns no shares of Class B Stock of MoPac.
- 33. Prior to Docember 1963, defendant Mississippi and its then chief executive officer, William G. Marbury ("Marbury") entered into a conspiracy with the members of the Board of Directors of MoPac to cause the owners of MoPac Class B Stock to

surrender their shares for less than the true value thereof, and thereby benefit defendant Mississippi and other owners of MoPac Class A Stock.

- 34. (a) Persuant to said conspiracy, in 1963 defendant Mississippi caused the Board of Directors of MoPac, including Defendants Craft, Davis and Milbank, to adopt a scheme which, if carried out, would appropriate for defendant Mississippi and the other Class A stockholders of MoPac, more than 95% of the equity owned by the Class B Stock of MoPac.
- (b) The aforesaid scheme involved formation of a new corporation and the consolidation of MoPac with the Texas and Pacific Railway Company, which was then 83% owned by MoPac.
- (c) The aforesaid scheme involved issuance of the same number of shares of stock in the new corporation for each outstanding share of MoPac Class A and Class B Stock, despite the fact that MoPac Class B Stock then had per share equity more than 52 times greater than Class A, and despite the fact that MoPac Class B Stock was then traded at a price per share many times greater than MoPac Class A Stock.
- (d) The aforesaid scheme involved denial of the right to a class vote with respect to a merger or consolidation.
- (e) The effect of the aforesaid schere if carried out, would have been to deprive the holders of MoPac Class B Stock of more than \$200 million of equity in MoPac, most of which would have gone to defendant Mississippi, the owner of a majority of the Class A Stock.
- (f) The aforesaid scheme was not abandoned by defendant Mississippi and the Loard of Directors of MoPac, including defendants, Craft, Davis and Milbank, until the United States Supreme Court unanimously held in 1967, 386 U.S. 152, that the

scheme illegally violated the rights of the holders of MoPac's Class B Stock.

- (g) After remand by the United States Supreme Court, the District Court (E.D. Mo.; Meredith, J.) found on January 12, 1968 that the aforesaid scheme was inherently unfair to the Class B shareholders and "would have taken from the B stockholders an equity in excess of \$200,000,000 and given it to the A stockholders."
- 35. (a) Further pursuant to said conspiracy to benefit defendant Mississippi at the expense of the Class B stockholders by causing the owners of the Class B Stock to surrender their shares at less than fair value, the defendants, notwithstanding their fiduciary duties toward all the stockholders of MoPac, have attempted to depress the market value of the Class B Stock by publicly denigrating its value.
- (b) In 1963, Mississippi's and MoPac's then chief executive officer, Marbury, stated for publication in "Forbes" magazine that the Class B Stock is a "second-class stock."
- (c) On December 12, 1963, Marbury characterized the Class B Stock as "second best" and a second-class stock in a speech to a group of securities analysts in New York City.
- (d) On other occasions, the circumstances of which are fully known to defendants and not to intervening plaintiff, Marbury made similar derogatory statements to the financial press and others (e.g., anyone is "crazy" to pay the market price for Class B Stock), as has Downing B. Jenks, Chief Executive Officer of MoPac and President of Mississippi (e.g., MoPac Class B Stock "isn't worth" the market price at which it sells).

- 36. (a) Pursuant to said conspiracy, MoPac's Board of Directors has failed and refused to pay fair and reasonable dividends on MoPac's Class B Stock.
- (b) Notwithstanding the facts that the Class B stockholders at the end of 1971 are the beneficial owners of over 64% of MoPac's equity and that MoPac has, as alleged in paragraph 18, \$72,531,000 available for dividends for the Class B, MoPac's management paid a total of \$199,000 individends to the Class B stockholders, while paying \$9,250,000 to Class A stockholders whose interest is less than 36% of the equity.
- (c) The decision to limit the Class B Stock to the level of \$5 in dividends per share has not been made because of bona fide business considerations, but has been made pursuant to said conspiracy, in order to depress the market value of the Class B Stock and to induce the holders of the Class B to surrender their stock at less than its actual value, and thereby benefit defendant Mississippi and the other holders of Class A Stock.
- 37. The aforesaid conduct by defendant Mississippi and by MoPac's Board of Directors, including the defendants Craft, Davis and Milbank, constitutes a fraud on the Class B stockholders, and has caused and is causing them grave and irreparable injury in denying them dividends to which they are entitled and in depressing the value of their stock.
- 38. Said fraudulent conduct is continuing and will continue unless enjoined by this Court.
 - 39. Plaintiff-intervenor has no adequate remedy at law.

Intervening Plaintiff's Third Claim

40. Intervening plaintiff repeats and realleges the allegations contained in paragraph 28 through 38 (including sub-

paragraphs) hereof, and further alleges that:

- owners of MoPac Class B Stock to surrender their shares for less than the true value thereof, the defendants, together with Marbury and the Boards of Directors of MoPac and Mississippi, by means of interstate commerce, the mails and the facilities of national securities exchanges, have engaged in a continuous course of manipulative and deceptive conduct. This conduct includes, interalia, the making of untrue statements of material fact, and omissions to state material facts necessary in order to render statements made by them not misleading. This course of conduct has operated as a fraud and deceit both upon the plaintiffs and the Class B stockholders represented by them, and upon those members of the investing public at large who bought and sold shares of MoPac A and B Stock during that period. This conduct commenced prior to 1963 and continues to the present.
- 42. As part of said course of manipulative and deceptive conduct the defendants and their aforedescribed co-conspirators performed each of the acts described in paragraphs 34 through 36 (including subparagraphs) above.

 In addition:
- 43. The defendants and their aforesaid co-conspirators have caused to be distributed to the stockholders of MoPac, through the mails and in interstate commerce, annual reports, and various other writings and communications containing false and misleading statements of material facts, and omissions of material facts, including the following:

- (a) a statement that MoPac's plan for consolidation with the T & P would produce economies of operation when defendants knew that no substantial economies of operation could be realized from the plan;
- (b) failure to disclose that the true motive of defendants and of all the directors of MoPac, in proposing said plan, was to appropriate almost 98% of the equity of the Class B Stockholders to the Class A Stock;
- (c) Statements showing annual per-share earnings for the Class A Stock as \$6.72 in 1961, \$12.07 in 1962, \$13.34 in 1963, \$13.66 in 1964, \$14.26 in 1965 and \$14.43 in 1966, whereas in fact, as found by the United States Supreme Court and as specified in MoPac's charter and as defendants well knew, the Class A Stock is limited to a maximum dividend right of \$5 per year as and if declared, and has no equity rights whatsoever beyond the stated value of \$100 per share, amounting in total to approximately \$185,000,000 for all Class A shares, which amount was more than covered by the surplus account of the corporation during the aforesaid years;
- (d) failure, during the same years aforesaid in subparagraph (c) above, to state any earnings per share whatsoever for the Class B Stock, which is the sole stock entitled to share in the residual equity of the corporation, clearly including all annual earnings over and above \$5 per share of Class A Stock.
- (e) failure, for the years 1967 to the present, to report any per share earnings whatsoever for any of McPac's stocks, despite the opinion of the Accounting Principles Board that such information is highly significant to investors and should be prominently reported in financial statements.

- (f) failure to report to MoPac's stockholders and the investing public that the reason for MoPac's discontinuance of its past practice of reporting earnings per share of Class A Stock by attributing all earnings to the Class A and none to the Class B was that the Securities and Exchange Commission had informed MoPac that such reporting was incorrect and improper.
- 44. Had the earnings figures referred to in subparagraphs (c) and (d) been correctly and honestly stated, they would have shown the following earnings per share of Class B Stock for each of the years 1961 through 1966: \$80.50 in 1961, \$326 in 1962, \$333 in 1963, \$405 in 1964, \$428 in 1965 and \$441 in 1966.
- 45. The foregoing conduct was part of a plan and conspirar conceived and carried out by defendants and their co-conspirators, to create an impression in the minds of the Class B shareholders and the investing public at large, by means of misreporting earnings and withholding dividends and otherwise, that the Class B Stock was far less valuable than was the fact, in order thereby to drive down the market price of the Class B and enable defendants to force its surrender, purchase it and destroy its equity in MoPac.
- 46. During the period of said conspiracy, defendants Mississippi and T. C. Davis bought and sold shares of MoPac's Class B Stock.
- 47. During the period of said conspiracy, plaintiff Alleghany made purchases of MoPac Class B Stock.
- 48. The aforesaid conduct of defendants and their coconspirators was and is in violation of state and federal statutes (including section 10(b) of the Securities Exchange Act of 1934)

and their common law fiduciary duty.

WHEREFORE, plaintiffs pray for judgment:

- (1) Directing that MoPac, through its Board of
 Directors, declare and pay fair and reasonable dividends on the
 Class B Stock for the year 1964 and for each of the years thereafter through 1971 with interest thereon from the time when such
 dividends should have been paid; or, in the alternative, awarding
 plaintiffs and all members of the class represented by them,
 damages against each of the defendants in the amount of the injury
 suffered by them during the years 1964 through 1971 as measured
 by the amount of reasonable dividends withheld by defendants
 pursuant to the fraudulent scheme complained of herein, with
 interest thereon from the time when such dividends should have
 been paid;
- (2) Enjoining the defendants, temporarily and permanently, from inequitably refusing to declare and pay fair and reasonable dividends on the Class B Stock in the future, and directing defendants to cause fair and reasonable dividends to be paid on the Class B Stock in the future;
- (3) Awarding plaintiff-intervenor its cost and expenses of this action, including reasonable attorneys' fees;
- (4) Retaining jurisdiction of this action for such period as may be necessary in order to assure compliance with the Court's order;
- (5) Granting plaintiff-intervenor such other and further relief as may be just and equitable.

July 14, 1972

DONOVAN LEISURE NEWTON & IRVINE

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7iled 12/19/72

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BETTY LEVIN, ALLEGHANY CORPORATION, and ROBERT LeVASSEUR,

Plaintiffs,

s,

: 67 Civ. 5095 (EW)

-against-

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT, T. C. DAVIS and THOMAS F. MILBANK, : STIPULATION OF SETTLEMENT

Defendants.

WHEREAS the above-entitled action was brought by plaintiffs Betty Levin (hereinafter "Levin"), Alleghany Corporation (hereinafter "Alleghany") and Robert LeVasseur (hereinafter "LeVasseur"), holders of Class B Stock of the Missouri Pacific Railroad Company (hereinafter "MoPac"), on behalf of themselves and all other holders of MoPac Class B Stock (the "Class"), and by plaintiffs Levin and LeVasseur derivatively on behalf and in the right of MoPac against defendants Mississippi River Corporation ("MRC"), the holder of a majority of the outstanding Class A Stock of MoPac, MoPac, Robert H. Craft, Thomas F. Milbank and T. C. Davis, directors of MoPac and/or MRC; and

WHEREAS the complaints and amended complaints filed by all three plaintiffs charge, in substance, that dividends declared and paid by MoPac on the Class B Stock through 1971 have been and are unreasonably and unjustifiably low, that Mississippi has through 1971 misused its voting

control over MoPac's board of directors in furtherance of a plan and conspiracy with said directors to improperly favor Mississippi and other Class A stockholders at the expense of the Class B stockholders and to "freeze out" the Class B stockholders, and that such conduct will continue unless enjoined by the Court; the complaints ask the ourt to direct MoPac to pay reasonable dividends for past years through 1971 to all Class B stockholders, plus interest thereon, that MoPac be directed to pay reasonable dividends on the Class B Stock in the future, and that plaintiffs be awarded their costs, expenses and reasonable counsel fees incurred in prosecuting this action; Plaintiffs Alleghany and Levin claim that MoPac and MRC have violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder by issuing public statements for the purpose of depressing the market price of MoPac Class B Stock; and in addition to these claims on behalf of the class, plaintiffs Levin and LeVasseur also assert derivative claims on behalf of MoPac; and

WHEREAS the defendants have appeared and answered and have denied the material allegations of the complaints and amended complaints and asserted that the claims alleged by plaintiffs therein are without merit and are barred in whole or in part by affirmative defenses; and

WHEREAS the Court, by Order of October 9, 1968, has determined that this action is properly maintainable as a class action on behalf of the Class pursuant to Rule 23(a), (b)(1) and (b)(2) of the Federal Rules of Civil Procedure and that plaintiffs are proper representatives of the Class; and

WHEREAS the plaintiffs and the defendants are convinced that the recapitalization of MoPac is desirable to

promote the welfare of MoPac and of all of its stockholders and to remove friction between different classes of stockholders; and

WHEREAS in order to put to rest the controversy between plaintiffs, and all other stockholders of MoPac on whose behalf this action was brought, and defendants, to obtain total and final settlement of all claims against defendants arising out of the purported acts alleged in the complaints, and to avoid further expense, inconvenience and the distraction of burdensome and protracted litigation, the parties hereto desire to settle, compromise and terminate this action and all claims asserted therein and any and all other claims against the defendants, which are based upon, or could be based upon, or arise from, any of the matters alleged in the complaints, regardless of the legal theory upon which they are based;

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, subject to the approval of the Court pursuant to Rules 23 and 23.1 of the Federal Rules of Civil Procedure, that an order and final judgment may be entered by the Court in accordance with Section 1.5 of the Settlement Agreement annexed hereto as Exhibit A and incorporated herein by reference (hereinafter "Settlement Agreement"), that all claims asserted in this action, and any and all other claims against the defendants, which are based upon, or could be based upon, or arise from any of the matters alleged in the complaints, regardless of the legal theory upon which they are based, shall be dismissed with prejudice and settled, upon the following terms:

- 1. Promptly after execution, this Stipulation of Settlement will be submitted to the Court with the request that it be approved pursuant to Rules 23 and 23.1 of the Federal Rules of Civil Procedure as fair and reasonable to the Class and to MoPac and with a form of Order, a copy of which is annexed hereto as Exhibit B, providing that a hearing be held to determine whether the settlement is adequate, proper, fair and reasonable, and providing that notice, in the form annexed to the proposed order as Exhibit 1, shall be printed or otherwise reproduced and mailed to all stockholders of MoPac, and that notice in the form annexed to the proposed order as Exhibit 2 shall be published, pursuant to Rules 23 and 23.1 of the Federal Rules of Civil Procedure, the expense of such publication, reproduction and mailing to be paid jointly by MoPac and MRC.
- 2. Upon approval of this settlement by the Court, an order and final judgment may be entered herein approving the settlement, adjudging the terms thereof to be adequate, proper, fair and reasonable and directing consummation of the settlement in accordance with its terms and provisions, dismissing the complaints herein on the merits with prejudice and without costs to any party, except as specifically provided in this Stipulation or the Settlement Agreement.
- 3. Upon approval by the Court of this settlement, it shall be consummated pursuant to the terms of this Stipulation and the Settlement Agreement.
- 4. The plaintiffs and the defendants will use their best efforts to obtain the Court's approval of the terms of settlement contained in this Stipulation and the Settlement Agreement.

- 5. In the event that the Settlement Agreement is duly terminated by one of the parties thereto pursuant to Section 7.7 thereof, this Stipulation may be terminated by written notice to all of the parties hereto, and any party may thereafter apply to the Court as provided in Section 7.9 of the Settlement Agreement to vacate the judgment entered pursuant to paragraph 2 of this Stipulation, which application will not be opposed by any party to this Stipulation.
- 6. Nothing incident or relating to the subject matter of this Stipulation or the Settlement Agreement, oral or written, including but not limited to negotiations and public announcements, may be used by any party against any other party in this action or in any other action, other than one to enforce rights and obligations created by or arising out of the Settlement Agreement or this Stipulation. This limitation shall survive the termination of the Settlement Agreement or of this Stipulation.
- 7. The plaintiffs agree that if dividends declared for any period between the date of the Settlement Agreement and the Effective Date as defined in Section 1.4 of the Settlement Agreement are declared as contemplated by Section 2.4 of the Settlement Agreement, they will make no objection to the reasonableness of such dividends.
- 8. After the entry of a final judgment approving the terms of the settlement contained herein, and after said judgment is no longer subject to appeal, counsel for plaintiffs Levin and LeVasseur will apply to the Court for allowances

of attorneys' fees and expenses in connection with this litigation, including the litigation in Missouri culminating in Levin v. Mississippi River Fuel Corp., et al., and Alleghany Corporation, et al. v. Mississippi River Fuel Corp., et al., 386 U.S. 162 (1967). Plaintiff Alleghany will apply to the Court at such time for reimbursement of attorneys' fees and expenses actually incurred by it in this action as provided in Section 7.10 of the Settlement Agreement. MoPac and MRC have indicated that they will not oppose the granting of allowances which in their judgment are reasonable, which indication is made without prejudice to their position on any application based upon the Missouri litigation described above which they may choose to oppose. Any allowances awarded and not subject to a further appeal shall be paid by MoPac and MRC.

9. This Stipulation of Settlement is not and shall not be construed to be either an admission by defendants of the validity of any of the claims asserted in the complaints or of their liability for any thereof, or of any wrongdoing whatsoever, or an admission by plaintiffs of any lack of merit in their allegations, and any statements or arguments made on behalf of any plaintiff or defendant at the settlement hearing or in support of the settlement shall not serve as evidence to be used in any way in any subsequent trial, proceeding or hearing in this action or in any other action or proceeding between the parties hereto.

approved by the Court, this &ipulation of Settlement (except for paragraphs 6 and 9 hereof) and all proceedings hereunder shall be considered as cancelled and void and shall be of no force or effect, and all parties to this action and Stipulation shall stand in the same position without prejudice as if the Stipulation and application had not been made and submitted to the Court for its consideration and approval.

Dated: New York, New York December /6', 1972

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SETTLEMENT AGREEMENT

THIS AGREEMENT, dated as of December/8, 1972, by and between ALLEGHANY CORPORATION ("Alleghany"), a Maryland corporation, MISSOURI PACIFIC RAILROAD COMPANY ("MoPac"), a Missouri corporation, and MISSISSIPPI RIVER CORPORATION ("MRC"), a Delaware corporation.

WITNESSETH:

WHEREAS, Alleghany, Betty Levin ("Levin") and Robert LeVasseur ("LeVasseur") (collectively, "Plaintiffs"), all of whom are Class B stockholders of MoPac, are maintaining, in the United States District Court for the Southern District of New York ("the Court"), an action ("the Action") entitled Levin, et al. v. Mississippi River Corporation, et al., 67 Civ. 5095 (EW), against MoPac and MRC, and also against Robert H. Craft, T. C. Davis and Thomas F. Milbank, who are directors of MoPac and/or MRC, (collectively, "Defendants"); and

WHEREAS, Alleghany, Levin and LeVasseur are maintaining the Action on behalf of themselves and all other Class B stockholders of MoPac, and Levin and LeVasseur are also maintaining the Action derivatively on behalf of MoPac; and

WHEREAS, Defendants deny the material allegations made against them in the Action and assert that the claims

alleged by Plaintiffs therein are without merit and are barred in whole or in part by affirmative defenses; and

WHEREAS, the parties hereto are convinced that the recapitalization of MoPac is desirable to promote the welfare of MoPac and all of its stockholders and to remove friction between different classes of its stockholders; and

WHEREAS, in order to put to rest the controversy between Plaintiffs, and all other stockholders of MoPac on whose behalf the Action was brought, and Defendants, and to avoid further expense, inconvenience and the distraction of burdensome and protracted litigation, the parties hereto desire to settle and compromise the Action and all claims asserted therein; and

WHEREAS, Alleghany beneficially owns 21,243 shares, or approximately 53 percent, of the 39,731 shares outstanding of Class B stock of MoPac, and MRC beneficially owns 1,158,395 shares, or approximately 62 percent, of the 1,864,052 shares outstanding of Class A stock of MoPac; and

WHEREAS, pursuant to order of the Interstate Commerce Commission, the Class B stock beneficially owned by Alleghany is held by Franklin National Bank ("Franklin") as voting trustee, and is held of record either by Franklin or by a nominee or nominees thereof;

NOW, THERE ORE, in consideration of the premises and of the mutual covenants hereinafter set forth, the parties hereto agree as follows:

1. Recapitalization, Tender Offer and Dismissal of the Action.

- 1.1 Recapitalization. As promptly as practicable after approval by the Court of the terms of settlement contained herein, and after clearance, if necessary, of proxy materials by the Securities and Exchange Commission (which clearance MoPac will use its best efforts to obtain as promptly as practicable after such approval by the Court), MoPac shall cause a meeting of its stockholders to be duly held, at which it shall submit to such stockholders for their approval, pursuant to the applicable laws of the State of Missouri and pursuant to the requirements for such approval set forth in Section 5.1(a) hereof: (a) the Plan of Recapitalization (the "Plan of Recapitalization") annexed hereto as Exhibit A and (b) an amendment (the "Amendment") to MoPac's Articles of Association in the form annexed to the Plan of Recapitalization. The Plan of Recapitalization provides for the recapitalization of MoPac on the following terms:
 - (a) The creation of a new class of 2,000,000 shares of \$5 Cumulative Preferred Stock, without par value, ("Preferred Stock"), each such share to be entitled to one vote, to a dividend preference of \$5 per annum, and to a preference of \$100 in the event of the liquidation, dissolution or winding-up of MoPac, and each such share to be convertible, at the option of the holder, into one share of Common

Stock (as defined in (b) below) at any time after one year following a final and effective order of the Interstate Commerce Commission (as defined in Section 5.1(b) hereof) authorizing the issuance of the Preferred Stock and the Common Stock, and to be redeemable, at the option of the Company, for \$100 at any time after December 31, 1975; and the conversion of each share of MoPac Class A Stock outstanding on the "Effective Date" (as defined in Section 1.4 hereof) into one share of Preferred Stock.

- (b) The creation of a new class of 3,000,000 shares of Common Stock, without par value, ("Common Stock"), each such share to be entitled to the rights set forth in the Amendment; and the conversion of each share of MoPac Class B Stock outstanding on the Effective Date into 16 shares of Common Stock and \$850 in cash.
- 1.2 Tender Offer. For a period of 15 business days, inclusive, commencing on the first business day after the Determination Date (as defined in Section 1.4 hereof) and subject to the terms below provided, MRC shall offer to purchase, on the Effective Date, for \$100 per share, such shares of MoPac Common Stock as are tendered to MRC. If fewer than 400,000 such shares are tendered, MRC shall be obligated

or more of such shares are so tendered. If 400,000 or more of such shares are so tendered, MRC shall be obligated to purchase 400,000 of such shares and may purchase, at its option, any additional shares so tendered. Should MRC elect to purchase less than all of the tendered shares, the shares purchased by MRC shall be purchased as nearly as may be pro rata, disregarding fractions, according to the number of shares tendered by each person tendering shares. Alleghany agrees that all shares of Common Stock issuable on the Effective Date in exchange for shares of Class B Stock beneficially owned by Alleghany will be tendered to MRC. MRC shall notify Alleghany two days prior to the Effective Date of the number of Alleghany shares it will purchase.

ness day after the Determination Date, MRC shall cause to be mailed (i) to each record owner of MoPac Class B Stock at the close of business on the Determination Date, other than record owners of Class B Stock beneficially owned only by Alleghany, and (ii) to Alleghany, a form or forms, approved by the Court, which shall (A) contain the tender offer by MRC provided for in Section 1.2 hereof and (B) provide appropriate means for such record owners and Alleghany to indicate how many, if any, of the shares of Common Stock issuable thereto (or in the case of Alleghany, issuable to Franklin or its nominees) on the Effective Date are to be tendered to MRC. Such forms shall contain the name and address of an exchange agent to

be selected by MoPac ("Exchange Agent") to whom such forms shall be returnable. An election to tender shares of Common Stock to MRC shall be effected by the delivery to the Exchange Agent no later than the close of business on the last day of the tender offer, of forms appropriately filled out to reflect such tender, duly executed by the record owner making the same or by Alleghany, accompanied by certificates, duly tendered, representing all of the shares of Class B Stock owned of record by such record owner.

- 1.4 Determination Date and Effective Date. The Determination Date shall be the third business day after the last of the conditions contained in Sections 5.1 and 5.5 hereof has been fulfilled. The Effective Date shall be the fifth business day following the completion of the tender offer described in Section 1.2.
- 1.5 <u>Dismissal of the Action</u>. Subject to Sections
 7.9 and 7.10 hereof, order and judgment dismissing the Action
 as to all Defendants with prejudice, and without costs to
 any party except as contemplated by this Agreement, may be
 entered by the Court as soon as possible after the approval
 by the Court of the terms of this Agreement.

2. Warranties and Representations of MoPac.

MoPac hereby warrants and represents, for the benefit of Plaintiffs and all other persons who are stockholders of MoPac (a) as of the date of this Agreement or (b) as of the Effective Date, as follows:

- 2.1 Authority. This Agreement has been duly authorized, executed and delivered by MoPac and constitutes a binding agreement of MoPac; and, subject only to approval by the Court of the terms of this Agreement, and to fulfill-ment of the conditions contained in Sections 5.1(a) and 5.1(b) hereof, MoPac has full power and authority to consummate the transactions contemplated hereby.
- 2.2 <u>Due Issuance</u>. The shares of MoPac Preferred Stock and Common Stock to be issued pursuant to the Plan of Recapitalization, when so issued, will have been validly authorized and issued by MoPac and will be fully paid and non-assessable.
- 2.3 No Inconsistent Agreements. Neither the execution of this Agreement, the issuance of MoPac Preferred Stock and Common Stock pursuant to the Plan of Recapitalization, nor any of the other transactions contemplated by this Agreement, has resulted or will result in a breach of any of the terms or provisions of, or has constituted or will constitute a default under, any indenture, agreement or other instrument to which MoPac is a party or by which MoPac or property thereof is bound.
- 2.4 <u>Dividends</u>. The Board of Directors of MoPac anticipates that subject to business conditions and the financial position and results of operations of MoPac it will be in a position to authorize the payment of an annual dividend of at least \$5.00 per share on the presently

outstanding Class B Stock, and the payment of quarterly dividends of \$1.25 per share on the Preferred Stock and at least \$1.25 per share quarterly on the Common Stock of MoPac following the tender offer, recapitalization and dismissal of the Action which are the subject of this Agreement.

- 2.5 Other Negotiations. MoPac was not engaged as of October 11, 1972, directly or indirectly, in any substantial negotiations or discussions with respect to any transaction (other than as provided for herein) involving a recapitalization, reorganization, merger, consolidation or sale of substantially all of the assets of MoPac.
- 2.6 <u>Compliance with Laws</u>. All acts to be performed by MoPac pursuant to this Agreement will be performed by it in full compliance with all material federal, state and local statutes, rules, regulations and other laws.

3. Warranties and Representations of MRC.

MRC hereby warrants and represents, for the benefit of MoPac, Plaintiffs, and all other persons who are stock-holders of MoPac (a) as of the date of this Agreement or (b) as of the Effective Date, as follows:

3.1 Authority. This Agreement has been duly authorized, executed and delivered by MRC and constitutes a binding agreement of MRC; and, subject only to approval by the Court of the terms of this Agreement and to fulfillment

of the conditions contained in Section 5.1 hereof, MRC has full power and authority to consummate the transactions contemplated hereby.

- 3.2 No Inconsistent Agreements. Neither the execution of this Agreement nor any of the transactions contemplated hereby has resulted or will result in a breach of any of the terms or provisions of, or has constituted or will constitute a default under, any indenture, agreement or other instrument to which MRC is a party or by which MRC or property thereof is bound.
- 3.3 Financing Commitments. MRC has obtained, on terms satisfactory to it, a valid and binding bank loan commitment letter in an amount sufficient to permit it to consummate the tender offer and purchase of shares contemplated by Section 1.2 hereof, and has furnished counsel for Plaintiffs with true copies of such commitment letter. The warranties and representations made by MRC in such commitment letter are true and correct.
- 3.4 Other Negotiations. MRC was not engaged as of October 11, 1972, directly or indirectly, in any substantial negotations or discussions with respect to any transaction (other than as provided for herein) involving a recapitalization, merger, consolidation or sale of substantially all of the assets of MoPac, or any sale or other disposition of MoPac stock owned or to be owned by MRC.
- 3.5 Compliance with Laws. All acts to be performed by MRC pursuant to this Agreement will be performed by it in

full compliance with all material federal, state and local statutes, rules, regulations and other laws.

4. Warranties and Representations of Alleghany.

Alleghany hereby warrants and represents to Defendants as follows:

- 4.1 Number of Class A and Class B Shares Owned.

 Alleghany is the beneficial owner of 21,243 shares of presently outstanding Class B Stock of MoPac and is the beneficial owner of 2,200 shares of presently outstanding Class A Stock of MoPac.
- 4.2 Authority. This Agreement has been duly authorized, executed and delivered by Alleghany, and constitutes a binding agreement of Alleghany; and, subject only to approval by the Court of the terms of this Agreement and to fulfillment of the conditions contained in Section 5.1 hereof, Alleghany has full power and authority to consummate the transactions contemplated hereby.
- 4.3 No Inconsistent Agreements. Neither the execution of this Agreement nor any of the transactions contemplated hereby has resulted or will result in a breach of any of the terms or provisions of, or has constituted or will constitute a default under, any indenture, agreement or other instrument to which Alleghany is a party or by which Alleghany or property thereof is bound.
 - 4.4 Compliance with Laws. All acts to be performed

by Alleghany pursuant to this Agreement will be performed by it in full compliance with all material federal, state and local statutes, rules, regulations and other laws.

5. Conditions to the Obligations of the Parties.

- 5.1 The obligations of the parties under Sections 1.2, 1.3 and 6.1 hereof are subject to the fulfillment of the following conditions:
 - ment and Plan of Recapitalization shall have been approved by vote of 75% of the outstanding shares of Class A Stock including a majority of the outstanding shares of Class A Stock voted by holders of Class A Stock other than MRC and Alleghany (or Franklin or its nominees, as the case may be), and 75% of the outstanding shares of Class B Stock including a majority of the outstanding shares of Class B Stock including a majority of the outstanding shares of Class B Stock voted by holders of Class B Stock other than MRC and Alleghany (or Franklin or its nominees, as the case may be).
 - (b) I.C.C. Matters. The Interstate Commerce Commission shall have issued a final and effective order authorizing, without conditions or modifications, or on conditions or modifications acceptable to the parties and approved by the Court and the stockholders of

MoPac (if in the opinion of MoPac such stockholder approval is required), (i) the issuance of the MoPac Preferred Stock and Common Stock pursuant to the Plan of Recapitalization, and (ii) any other matters concerning which MoPac deems it necessary to have Interstate Commerce Commission approval.

- (c) <u>S.E.C. Matters.</u> (i) Either the Securities and Exchange Commission shall have issued an order, pursuant to Section 12(h) of the Securities Exchange Act of 1934, as amended ("the Exchange Act"), satisfactory to Alleghany and its counsel, Messrs. Donovan Leisure Newton & Irvine, exempting Alleghany from Section 16(b) of the Exchange Act to the extent of its participation in the transactions contemplated by this Agreement, or Alleghany shall have received from such counsel an opinion, satisfactory to Alleghany in form and substance, to the effect that Alleghany will not incur any liability under Section 16(b) of the Exchange Act in connection with the transactions contemplated by this Agreement;
 - (ii) Alleghany shall have obtained any necessary order from the Securities and Exchange Commission to exempt any of the acts to be performed by Alleghany pursuant to this Agreement which might be subject to the provisions of the Investment Company Act of 1940, as amended ("Investment Company

Act"), or Alleghany and its counsel, Messrs.

Donovan Leisure Newton & Irvine, shall have supplied Defendants and their respective counsel with an opinion of Alleghany's counsel, satisfactory to Defendants and their counsel in form and substance, to the effect that Alleghany would not be prohibited under the Investment Company Act from performing any of the acts to be performed by Alleghany pursuant to this Agreement.

(iii) Either the Securities and Exchange

Commission shall have issued an order, pursuant to

Section 12(h) of the Exchange Act, satisfactory to

MRC and its counsel, Messrs. Dewey, Ballantine,

Busl by, Palmer & Wood, exempting MRC from Section

16(b) of the Exchange Act to the extent of its participation in the transactions contemplated by

this Agreement, or MRC shall have received from

such counsel an opinion, satisfactory to MRC in

form and substance, to the effect that MRC will not

incur any liability under Section 16(b) of the

Exchange Act in connection with the transactions

contemplated by this Agreement.

(d) MRC Financing. MRC shall have available to it the necessary bank loans or other financing in amounts sufficient to permit MRC to consummate the tender offer and purchase of shares contemplated by Section 1.2 of this Agreement.

- 5.2 Opinions of MoPac Counsel. The right of MoPac to effectuate the Plan of Recapitalization and to cause the Amendment to become effective, and the obligation of Plaintiffs and MRC to convert their shares of MoPac stock pursuant thereto, are subject to the fulfillment of the following conditions:
 - (a) Plaintiffs and MRC shall have received from Messrs. Sullivan & Cromwell, counsel to MoPac, a written opinion, dated the Effective Date, to the effect that:
 - (i) This Agreement has been duly authorized, executed and delivered by MoPac and constitutes a binding agreement of MoPac; and MoPac has full power and authority to carry out the transactions contemplated hereby.
 - (ii) The share of MoPac Preferred Stock and Common Stock into which the Class A Stock and Class B Stock are to be converted pursuant to the Plan of Recapitalization are validly authorized, issued and outstanding, and fully paid and non-assessable.
 - (iii) Either it is not necessary in connection with the conversion of Class A Stock into Preferred Stock and Class B Stock into Common Stock to register the Preferred Stock or Common Stock under the Securities Act of 1933, as amended, or a registration statement under such act is in effect with respect thereto.
 - (iv) All proceedings, consents or other authorizations or approvals of the Interstate Commerce

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Commission or of any other federal regulatory agency or federal governmental body required in connection with the consummation by MoPac of the transactions contemplated by this Agreement have been obtained and are in full force and effect.

In rendering its opinion hereunder, such counsel may rely, to the extent specified in its opinion, on factual information furnished by MoPac and on opinions rendered by local counsel.

- (b) Plaintiffs and MRC shall have received from Messrs. Bryan, Cave, McPheeters & McRoberts, counsel to MoPac, a written opinion, dated the Effective Date, to the effect that:
 - (i) None of the transactions contemplated by this Agreement has resulted or will result in a breach of any of the terms and provisions of, or has constituted or will constitute a default under, any indenture, agreement or other instrument, known to such counsel, to which MoPac is a party or by which MoPac or property thereof is bound.
 - (ii) All proceedings, orders, consents, or other authorizations or approvals of any state or local regulatory agency or other governmental body (other than in connection or as to compliance with provisions of the state securities or Blue Sky laws of any jurisdiction other than the State of Missouri)

required in connection with the consummation by MoPac of the transactions contemplated by this Agreement have been obtained and are in full force and effect.

In rendering its opinion hereunder, such counsel may rely, to the extent specified in its opinion, on factual information furnished by MoPac and on opinions rendered by local counsel.

- 5.3 Opinion of MRC Counsel. The right of MRC to purchase shares of Common Stock tendered thereto pursuant to Sections 1.2 and 1.3 hereof, and the obligation of the holders of such shares to sell the same to MRC, are subject to the receipt by Plaintiffs from Messrs. Dewey, Ballantine, Bushby, Palmer & Wood, counsel to MRC, of a written opinion, dated the Effective Date, to the effect that:
 - (a) This Agreement has been duly authorized, executed and delivered by MRC and constitutes a binding agreement of MRC; and MRC has full power and authority to carry out the transactions contemplated hereby.
 - (b) None of the transactions contemplated hereby has resulted or will result in a breach of any of the terms and provisions of, or has constituted or will constitute a default under, any indenture, agreement or other instrument, known to such counsel, to which MRC is a party or by which MRC or property thereof is bound.
 - (c) All proceedings, orders, consents, or other authorizations or approvals of any federal, state or

local regulatory agency or other governmental body

(other than in connection with or as to compliance with

provisions of state securities or Blue Sky laws) required

in connection with the consummation by MRC of the trans
actions contemplated by this Agreement have been obtained

and are in full force and effect.

In rendering its opinion hereunder, such counsel may rely, to the extent specified in its opinion, on factual information furnished by MRC, and on opinions rendered by local counsel.

- 5.4 Opinion of Alleghany Counsel. The obligations of MoPac and MRC to consummate the Plan of Recapitalization and tender offer as provided in Section 6.1 hereof are subject to the receipt thereby of a written opinion, dated the Effective Date, for Messrs. Donovan Leisure Newton & Irvine, counsel to Alleghany, to the effect that:
 - (a) This Agreement has been duly authorized, executed and delivered by Alleghany and constitutes a binding Agreement of Alleghany; and Alleghany has full power and authority to carry out the transactions contemplated hereby.
 - (b) None of the transactions contemplated hereby has resulted or will result in a breach of any of the terms and provisions of, or has constituted or will constitute a default under, any indenture, agreement

or other instrument, known to such counsel, to which Alleghany is a party or by which Alleghany or property thereof is bound.

(c) All proceedings, orders, consents, or other authorizations or approvals of any federal, state or local regulatory agency or other governmental body (other than in connection or as to compliance with provisions of the state securities or Blue Sky laws of any jurisdiction) required in connection with the consummation by Alleghany of the transactions contemplated by this Agreement have been obtained and are in full force and effect.

In rendering its opinion hereunder, such counsel may rely, to the extent specified in its opinion, on factual information furnished by Alleghany, and on opinions rendered by local count.

5.5 <u>Court Approval</u>. This settlement is subject to approval by the Court pursuant to Rules 23(e) and 23.1 of the Federal Rules of Civil Procedure (including any necessary approval of any change, amendment or modification of the terms hereof).

6. Closing.

6.1 Action to be Taken at Closing.

- (a) A Closing under this Agreement will be held at 10:00 a.m., local time, on the Effective Date, at the offices of MoPac, 210 North 13th Street, St. Louis, Missouri, or such other place as may be mutually agreed upon by the parties hereto.

 (b) The obligations of each of the parties hereto under this Section 6.1 are subject to performance of all of
 - the actions to be performed pursuant to such section.

 (c) The following action will be taken at the Closing:
 - (1) MoPac will cause the Amendment to be deposited with a custodian to be selected by the parties hereto (the "Custodian") for filing pursuant to Missouri law.
 - (2) The opinions of counsel referred to in Sections 5.2, 5.3 and 5.4 hereof will be deposited with the Custodian for delivery to the appropriate recipients.
 - (3) MoPac will deposit with the Custodian for delivery to an Exchange Agent the certificates representing the shares of Preferred Stock issuable to the former Class A stockholders pursuant to the Plan of Recapitalization.
 - (4) MoPac will deposit with the Custodian for delivery to an Exchange Agent certified or bank checks in the aggregate amount of the cash payable to the former Class B stockholders pursuant to the Plan of Recapitalization

and the certificates representing the shares of Common Stock issuable to the former Class B Stock-holders pursuant the Plan of Recapitalization.

- (5) MRC will deposit with the Custodian for delivery to an Exchange Agent certified or bank checks in the aggregate amount of the purchase price for the shares of Common Stock tendered to MRC by the former Class B stockholders and purchased by MRC.
- (6) MoPac and MRC will deliver to the Custodian for delivery to Plaintiffs certified or bank checks in the aggregate amount of the allowances of fees and expenses, if any, referred to in Section 7.10 hereof.
- specified in Section 6.1(c)(1) through (6), the Custodian will file the Amendment with the proper authorities and simultaneously deliver the opinions and cause the Amendment to become effective under Missouri law. Thereupon, the instruments and securities specified in Section 6.1(c)(3), (4), (5) and (6) shall be held by the Custodian for, and shall be immediately deliverable to, the respective parties entitled thereto, as hereinafter provided.
- (8) The Custodian will immediately deliver to the Exchange Agent the items mentioned in Section 6.1

(c) (3), (4), and (5).

- (9) The Exchange Agent will, (i) immediately pay and deliver to the former holders of shares of Class B Stock the certificates for which were duly tendered as provided in Section 1.3 or are duly tendered to MRC at the Closing, the cash and the certificalls representing the Common Stock into which such shares have been converted (less any shares purchased by MRC and plus the cash paid by MRC for such shares purchased) pursuant to the Plan of Recapitalization; (ii) immediately deliver to MRC the certificates representing the shares of Common Stock purchased by it; (iii) hold as agent for each holder of former Class A shares the certificates representing the Preferred Stock into which such shares have been converted pursuant to the Plan of Recapitalization, for delivery upon surrender of certificates representing such former Class A shares; and (iv) hold as agent for each holder of former Class B shares represented by certificates not duly tendered to the Exchange Agent as provided in Section 1.3 or to MRC at the Closing, the cash and the certificates representing the Common Stock into which such shares have been converted pursuant to the Plan of Recapitalization, for payment and delivery upon surrender of certificates for such former Class B shares.
- (d) The Custodian will deliver to Plaintiff Alleghany and to counsel for Plaintiffs Levin and LeVasseur, Messrs.

Orans, Elsen & Polstein, and Messrs. Pomerantz, Levy, Haudek & Block, respectively, certified or bank checks for the allowances of fe and expense eferred to in Section 7.10 hereof, or, if such fees have been awarded by the time of the Closing, the Defendants shall pay such fees and allowances to the persons and firms named above immediately after such award has become final.

7. Further Agreements of the Parties.

- their best efforts to obtain the Court's approval of the terms of settlement contained in this Agreement. Without limiting the foregoing, as promptly as possible after the date of this Agreement the parties hereto will submit to the Court, for its approval after notice to PoPac stockholders as required by Rules 23(e) and 23.1 of the Federal Rules of Civil Procedure, the terms of settlement contained in this Agreement, and will also submit to the Court a proposed form of notice to such stockholders. All expenses of printing and mailing such notice will be borne jointly by MoPac and MRC.
- efforts to bring about the fulfillment of the condition contained in Section 5.1(a) hereof. Alleghany will use s best efforts to cause the shares of MoPac stock beneficia owned by it to be voted in favor of the Plan of Recapitalization and the Amendment. MRC will cause all shares of MoPac stock owned by it, beneficially or of record, to be voted in favor of the Plan of Recapitalization and the Plan of Recapitalization and the

Amendment. MRC and Alleghany agree that, prior to the day following the Effective Date, they will not dispose of any shares of MoPac stock owned by them as of the date hereof beneficially or of record, other than pursuant to the Plan of Recapitalization and tender offer provided for herein.

- 7.3 I.C.C. Application. MoPac will file with the Interstate Commerce Commission an application for the order referred to in Section 5.1(b) hereof, and MoPac will use its best efforts to obtain such order as promptly as possible, and to bring about the fulfillment of the condition contained in Section 5.1(b) hereof.
- 7.4 Non-Severability of Recapitalization and

 Tender Offer. The Plan of Recapitalization annexed hereto
 and the tender offer referred to in Section 1.2 hereof are
 mutually interdependent obligations.
- 7.5 <u>Limitation on Other Purchases</u>. MoPac and MRC agree that neither they, their subsidiaries, nor any person acting on their behalf shall purchase any shares of MoPac Preferred Stock or Common Stock for a price in excess of \$100 per share for a period of six months after the Effective Date.
- 7.6 Further Limitation on Purchases. Alleghany agrees that neither it nor any person acting in its behalf shall purchase any shares of MoPac Preferred Stock or Common Stock or MRC capital stock for a period of three years after the Effective Date.

- 7.7 Termination. In the event that the Closing contemplated by Section 6.1 of this Agreement does not take place on or before December 31, 1973, this Agreement may be terminated at the option of Alleghany, MoPac or MRC, by written notice to all of the parties hereto. Any termination under this Section 7.7 shall be without prejudice to any rights or remedies that any party may possess at the date of such termination by reason of any breach of this Agreement by any other party prior to such date.
- this Agreement, Plaintiffs and Defendants and all members of the class represented by Plaintiffs are deemed to agree that nothing incident or relating to the subject matter of this Agreement, oral or written, including but not limited to negotiations and public announcements, may be used by any such party or class member against any other party or class member in the Action or in any other action, other than one to enforce rights and obligations created by or arising out of this Agreement. This limitation shall survive the termination of this Agreement.
- 7.9 Retention of Jurisdiction by Court. Upon
 the entry of the judgment referred to in Section 1.5 hereof,
 the Court shall nevertheless retain jurisdiction of the
 matter to supervise the consummation of the settlement and
 for the purpose of awarding the fees and allowances referred
 to in Section 7.10. If the settlement is not consummated,

any party may move to reopen the judgment and no party shall oppose such application.

- 7.10 Fees of Counsel. After the entry of a final judgment by the Court approving the terms of settlement contained herein, and after such final judgment is no longer subject to appeal, Plaintiffs and/or counsel will apply to the Court for allowances of fees and expenses, including fees and disbursements of attorneys, accountants and experts; and Defendants will not oppose the granting of such allowances as in their judgment are reasonable. Any such allowances shall be paid by MoPac and MRC.
- 7.11 Waiver of Funne Actions. Each named Plaintiff in the Action and any member of a class represented by a named Plaintiff in the Action, by approval of this Agreement, is deemed to waive any objection to the propriety of the representation contained in Section 2.4 hereof, and to the reasonableness of the dividends declared by MoPac for any period between the date of this Agreement and the Effective Date if declared as contemplated in Section 2.4 hereof.
- 7.12 <u>Cooperation in Effecting Settlement</u>. The parties agree that they and their respective counsel will cooperate and consult with one another fully, in preparing for and consummating the transactions contemplated by this Agreement.
- 7.13 Best Efforts. MoPac, MRC and Alleghany will use their respective best efforts to procure and cause to be

delivered to the other parties, as contemplated by this Agreement, the opinions of their respective counsel referred to in Sections 5.2, 5.3, and 5.4 hereof (including the use of their respective best efforts seasonably to obtain or bring about all such proceedings, consents, or other authorizations, approvals or actions as may be required to form the basis of such opinions). Alleghany and MRC will use their respective best efforts to bring about the fulfillment of the conditions contained in Section 5.1(c) hereof. MRC will use its best efforts to bring about the fulfillment of the conditions contained in Section 5.1(d) hereof.

- 7.14 Exchange Listing. Promptly after the Effective Date and for a period of five years thereafter, MoPac will use its best efforts to cause its Preferred Stock and Common Stock to be listed on the New York Stock Exchange, if during such time the Exchange's requirements for listing are met.
- 7.15 Action to be Taken by Alleghany. On the Determination Date or as promptly thereafter as possible, Alleghany will advise MoPac as to the name of each person who on such date held of record shares of Class B Stock beneficially owned by Alleghany, and as to the number of such shares so held by each such person.
- 7.16 Survival. The warranties, representations and other obligations contained in this Agreement shall survive the consummation of the transactions contemplated hereby, including the actions to be taken at the Closing hereunder.
- 7.17 Entire Agreement. This Agreement contains the entire agreement between the parties hereto with respect to the transactions contemplated hereby, and may not be

modified or amended except by a writing duly executed by the party against whom the modification or amendment is asserted.

- 7.18 <u>Counterparts</u>. This Agreement may be executed in one or more counterparts, each of which shall be deemed to constitute an original, but all of which together shall constitute the same agreement.
- 7.19 Governing Law. This Agreement shall be construed and applied according to the laws of the State of New York.
- 7.20 <u>Captions</u>. Captions are for reference only and do not constitute a part of this Agreement.
- 7.21 Notices. All notices hereunder shall be in writing and shall be deemed to have been duly given if personally delivered, telegraphed or mailed by certified mail as follows:
 - (a) If to Alleghany, to:

Mr. John J. Burns, Jr. Alleghany Corporation 350 Park Avenue New York, N. Y. 10022

copy to:

John E. Tobin, Esq.
Donovan Leisure Newton & Irvine
2 Wall Street
New York, N. Y. 10005

(b) If to MoPac, to:

Mark M. Hennelly, Esq.
Missouri Pacific Railroad Company
210 North 13th Street
St. Louis, Missouri 63103

copy to:

David W. Peck, Esq. Sullivan & Cromwell 48 Wall Street New York, N. Y. 10005

(c) If to MRC, to:

Cleon L. Burt, Esq.
Mississippi River Corporation
9900 Clayton Road
St. Louis, Missouri 63124

copy to:

Everett I. Willis, Esq.
Dewey, Ballantine, Bushby,
Palmer & Wood
140 Broadway
New York, N. Y. 10005

or to such different person or address as the parties hereto may designate by written notice.

IN WITNESS WHEREOF, each party has caused this Agreement to be duly executed as of the date first above written.

ATTEST:

Vice President and Secretary

ATTEST:

Assistant Secretary

ATTEST:

In amstrong Secretary ALLEGHANY CORPORATION

Vice President - Finance

MISSOURI PACIFIC RAILROAD COMPANY

By Chairman of the Board

MISSISSIPPI RIVER CORPORATION

Executive Vice President

EXHIBIT A

PLAN OF RECAPITALIZATION

WHEREAS, the Board of Directors of Missouri
Pacific Railroad Company (the "Company") has determined
that the recapitalization of the Company is desirable
to promote the welfare of the Company and all its
stockholders and to remove friction between different
classes of stockholders; and

WHEREAS, the Board of Directors of the Company has approved a plan of recapitalization which provides, subject to certain conditions, including stockholder approval, for the creation of a new class of 2,000,000 shares of \$5 Cumulative Preferred Stock, without par value ("Preferred Stock"), each such share to be entitled to one vote, to a dividend preference of \$5 per annum, and to a preference of \$100 in the event of the liquidation, dissolution or winding up of the Company, and each such share to be convertible, at the option of the holder, into one share of Common Stock (as defined below) at any time after one year following a final and effective order of the Interstate Commerce Commission authorizing the issuance of the Preferred Stock and the Common Stock, and to be redeemable, at the option of the Company, for \$100 at any time after December 31, 1975; and the conversion of each

share of the Company's Class A Stock outstanding on the Effective Date (as defined in the Settlement Agreement) into one share of Preferred Stock; and the creation of a new class of 3,000,000 shares of Common Stock, without par value ("Common Stock"); and the conversion of each share of the Company's Class B Stock outstanding on the Effective Date into 16 shares of Common Stock and \$850 in cash; and

WHEREAS, as a part of a Settlement Agreement

(the "Settlement Agreement") in an action entitled Levin,

et al. v. Mississippi River Corporation, et al. in the

United States District Court for the Southern District of

New York ("District Court"), the Company has agreed, subject

to District Court approval, stockholder approval and the

satisfaction of certain other terms and conditions, to

cause the recapitalization of the Company on the basis

above set forth; and

WHEREAS, the District Court has approved the Settlement Agreement; and

WHEREAS, the Board of Directors of the Company wishes to place before the stockholders for their approval the following plan of recapitalization;

NOW, THEREFORE, the following Plan of Recapitalization of the Company is hereby set forth:

1. Amendment. Subject to the conditions set forth below in Section 2, an amendment (the "Amendment") to the

Company's Articles of Association in substantially the form annexed hereto as Exhibit 1 shall be executed and filed on behalf of the Company with the proper authorities of the State of Missouri and shall be caused to become effective under Missouri law.

2. Conditions.

- heen approved by vote of 75% of the outstanding shares of Class A Stock of the Company including a majority of the outstanding shares of Class A Stock voted by holders of Class A Stock other than those shares beneficially owned by Mississippi River Corporation, a Delaware corporation ("MRC"), and Alleghany Corporation, a Maryland corporation ("Alleghany"), and 75% of the outstanding shares of Class B Stock of the Company including a majority of the outstanding shares of Class B Stock other than those shares beneficially owned by MRC or Alleghany;
- (b) The Interstate Commerce Commission shall have issued a final and effective order authorizing, without conditions or modification, or on conditions or modifications acceptable to the Company and approved by the District Court and the stockholders of the Company (if in the opinion of the Company such stockholder approval is required), (i) the issuance of the Company's Preferred Stock and Common Stock pursuant to the Amendment, and

- (ii) any other matters concerning which the Company deems it necessary to have Interstate Commerce Commission approval;
- (c) MRC shall have made a tender offer on the terms set forth in the Settlement Agreement; and
- (d) The transactions contemplated to be taken at the Closing described in the Settlement Agreement shall have taken place.

CONTERED

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In the

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK COPY RECEIVED

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SULLI AN & CROMWELL

BETTY LEVIN, ALLEGHARY CORICRATION and ROMERT LE VASSEUR,

Plaintiffs.

against

) 67 CIV 5095(117)

MISSISSIFFI RIVER CORFORATION, MISSOURI PACIFIC RAILROAD CONFANY, ROBERT H. CRAFF, T. C. DAVIS AND THOMAS F. MILBANK,

Defendants.

OBJECTIONS OF JACOB R. CORN AND JUNE CORN TO THE APPROVAL

TO: Messrs. Crans, Elson & Polstein One Rockefeller Flaza New York, New York 10020

> Messrs. Pomerantz, Levy, Haudek & Elock 295 Madison Avenue New York, New York 10017

Messrs. Davey, Ballantine, Bushby, Palmer & Wood 140 Eroadway New York, New York 10005

Messrs, Sullivan & Cromwell 48 Wall Street New York, New York 10005

NOW come Jacob R. Cohen and June Cohen, the joint owners of 50 shares of Class A stock of the Missouri Pacific Railroad Company, and object to the approval of the proposed agreement of settlement upon the following grounds:

- 1. The "Legal Notice" to the stockholders of the proposed settlement is fatally defective because it fails to apprize the stockholders of sufficient facts to enable them to determine whether the proposed settlement is "adequate, proper, fair, and reasonable." Specifically:
- A. The notice fails to indicate the nature of the derivative action brought by the plaintiffs and the basis for its dismissal.

 No facts elicited in the discovery proceedings are disclosed so that

the shareholders cannot determine whether there is a reasonable probability of success if the complaint is litigated. Further, the notice fails to disclose any consideration for the dismissal of the derivative defendants.

B. 7.10 of the settlement agreement provides that attorney fees will be paid by the Missouri Facific Railroad Company and the Mississippi River Corporation. However, it does not indicate how much of the fees will be paid by the Missouri Facific Railroad Company nor the basis for arriving at the amount.

C. The settlement fails to indicate the basis for the agreement of the Missouri Pacific Railroad Company not to oppose the application of Alleghany Corporation for approximately \$350,000 in attorney's fees and expenses.

D. The notice fails to disclose the basis for the determination that the value of each share of Class B stock equals 16 shares of common stock and \$850 in cash.

E. The implementation of the settlement agreement may result in the payment of as much as \$33,771,350 in cash by the Missourii Pacific Railroad. The notice fails to disclose the effect of such payment on the financial structure of the Missouri Pacific Railroad and the additional financing costs of its operations which may result from the pay out of cash of such a magnitude.

F. The notice to all shareholders dated October 30, 1972, encloses a copy of a news release summarizing the agreement between the parties, which includes reference to an option to the Class: B shareholders other than Allegheny to elect to receive only sharms of new common stock and no cash. This option does not appear im the settlement agreement. Its elimination may have an adverse effect on the cash position of the Missouri Pacific Railroad. The

notice fails to disclose the reasons for this change.

- 2. The objectors further object to the approval of the settlement agreement because it is contingent upon the Mississippi River Corporation having available to it the necessary financing to permit consumnation of the tender offer. Thus, if such financing is not available, the parties will have gone to considerable expense in connection with this application for approval to no good purpose and the court will have expended its resources on a settlement that did not come to fruition. It is these objectors position that letters of intent pledging sufficient financing should be procured by the Mississippi River Corporation prior to any hearing for approval of this settlement.
- of fees or expenses may be made by the Missouri Pacific Railroad in excess of amounts incurred by plaintiffs which bear a direct relationship to pecuniary benefits, if any, derived by the Missouri Pacific Railroad from this lawsuit, are related to the allegations of the complaints, and were not necessitated by the conduct of the Mississippi River Corporation or the individual defendants described in the complaints. The settlement agreement should so provide.

Wherefore, these objectors pray for the entry of an order that the proposed agreement of settlement not be approved.

Michael Paul Cohen 7319 N. Oakley Chicago, Illinois 60645

Attorney for Objectors

STATE OF NEW YORK) : ss.:
COUNTY OF NEW YORK)

Thomas J. Cerna, being duly sworn, deposes and says that he is over the age of 18 years and not a party to this action. On October 23, 1974 he caused the annexed Appendix Vols. I & II to be served upon Gerard M. Carey, Esq.; William Heimowitz, Esq.; Dewey Ballantine Bushby Palmer & Wood; Sullivan & Cromwell; Orans, Elsen & Polstein; and Pomerantz, Levy, Haudek & Block by personal delivery at their offices designated for service in this action; and upon Michael Paul Cohen, Esq., by mailing to his offices at 7319 N. Oakley, Chicago, Illinois.

Sworn to before me this 23rd day of October, 1974.

ary public

HUGH F. PETTIT

Notary Public, State of New York

No. 41-3081100

Qualified in Queens County

Cert. filed in New York County

Commission Expires March 30, 1975